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COVID-19 Advisory

Impact of COVID-19 on School Personnel

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The Families First Coronavirus Response Act (H.R. 6201), EEOC Guidance, and Additional FAQs

The COVID-19 pandemic continues to create many issues for LEA operations. The following Advisory addresses three areas of immediate import: (1) the new Federal Families First Coronavirus Response Act (H.R. 6201); (2) Equal Employment Opportunity Commission COVID-19 Guidance; and (3) Additional FAQs.

The Families First Coronavirus Response Act (H.R. 6201)

The Families First Coronavirus Response Act (H.R. 6201) ("FFCRA") has passed the Senate and been signed by President Donald Trump. Effective April 2, 2020, the FFCRA includes two additional acts modifying existing leave laws: (1) the Emergency Family and Medical Leave Expansion Act ("EFMLEA"); and (2) the Emergency Paid Sick Leave Act ("EPSLA"). These new provisions apply to all public employers employing more than one person and make some significant changes and additions to federal leave laws.

EFMLEA Amends FMLA to Add "Public Health Emergency Leave"

Although the EFMLEA amends the FMLA in several material respects, it does not expressly add additional job-protected leave time. Employees who take Public Health Emergency Leave will be eligible for the same amount of FMLA leave (12 weeks) as employees who take leave for other FMLA-covered reasons. For example, existing FMLA provisions would already cover employees who need to take a leave because they or a family member have been diagnosed with COVID-19 because it qualifies as a "serious health condition."

Unlike typical FMLA leave, however, Public Health Emergency Leave also provides *paid* leave for any eligible leave taken after the first ten days of leave.

There remain questions that if the California Family Rights Act ("CFRA") is not similarly amended, employers may face the potential of providing additional leave under CFRA because utilizing the new FMLA leave may not exhaust an employee's CFRA entitlement.

Public Health Emergency Leave

Under the EFMLA, eligible employees with minor children may take up to 12 workweeks of leave if the employee is unable to work (or work remotely) due to a need to care for a child because school or place of care has been closed, or the child-care provider of a son or daughter is unavailable due to a coronavirus emergency as declared by a Federal, State or local authority.

Eligible Employees: Unlike eligibility for general FMLA (requiring an employee be employed for at least 12 months and worked 1,250 hours over the previous 12 month period), employees will be eligible for Public Health Emergency Leave if they have been employed for at least 30 calendar days.

Pay Requirements: No pay is required during the first ten days of the leave but employees may opt to utilize any accrued paid time off, vacation time, sick leave, or other paid leave during this initial period (including sick leave under the EPSLA leave discussed below).

After the first ten days of Public Health Emergency Leave, employees must be provided 2/3 of their regular rate of pay (as by the FLSA) for the number of hours the employee would normally be scheduled to work. However, this shall not exceed $200 per day or $10,000 in aggregate.

Emergency Paid Sick Leave

The Emergency Paid Sick Leave Act ("EPSLA") is also contained within FFCRA and provides paid leave for a broad range of coronavirus-related reasons. Please see H.R. 6201 (https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf) for the enumerated reasons and contact legal counsel for specific assistance.

This law requires employers to provide employees with two weeks (80 hours) of paid sick time for full-time employees and a pro-rata share for part-time employees (the number of hours equal to the number of hours that such employee works, on average, over a two-week period). This paid sick leave is in addition to any leave currently provided by the employer. All employees are eligible for this leave, regardless of their length of employment.

Pay Requirements: Emergency Paid Sick Leave is calculated based on the employee's regular rate of pay but is limited to either: (1) $511 per day or $5,110 total if the employee is using the leave for his or her own use related to the coronavirus; or (2) 2/3 of the regular rate of pay (but no less than minimum wage) and limited to $200 per day or $2,000 total, where the employee is using the leave to care for an individual affected by the coronavirus, for child care responsibilities due to closures, or if an employee is experiencing a condition substantially similar to the coronavirus.

An employee may use Emergency Paid Sick Leave during a period of initial leave and an employer may not require an employee to utilize other accrued paid sick leave first.

Please note that caring for "an individual who is subject to a quarantine or isolation order or advised to self-quarantine by a health care provider" is not limited to family members.

The Secretary of Labor will be issuing a model notice regarding the new sick leave law for posting by employers.

The EEOC Issues Guidance Regarding COVID-19

This week, the EEOC, which is the federal organization enforcing workplace antidiscrimination laws such as the ADA, also issued new guidance related to COVID-19, responding to specific questions about employment inquiries related to the pandemic. The guidance specifically notes that while all of these laws continue to apply, they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities (https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) about steps employers should take regarding COVID-19. **"Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety."**

The following FAQs are taken directly from the EEOC Guidance and may be helpful when determining information can be obtained from employees regarding their symptoms and exposure to COVID-19. Note that we are generally still advising that employers not take the body temperature of their employees but if you have a specific need, please contact us to discuss. (For full guidance and additional links, see *What You Should Know About the ADA, the Rehabilitation Act, and COVID-19* at https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

Q: How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? (https://www.eeoc.gov/facts/pandemic_flu.html#q6)

A: During a pandemic, employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these symptoms include fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Q: When may an employer take the body temperature of employees during the COVID-19 pandemic? (https://www.eeoc.gov/facts/pandemic_flu.html#q7)

A: Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local

health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

Q: Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19? (https://www.eeoc.gov/facts/pandemic_flu.html#q5)

A: Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

Q: When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty? (https://www.eeoc.gov/facts/pandemic_flu.html#q16)

A: Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

Other Questions You May Have

We have added additional FAQs based on the questions that we continue to be asked:

Q: How should we handle employees who qualify as "high risk" (over 65 or have a chronic health condition)?

A: The CDC has identified certain individuals as higher risk for severe illness from the coronavirus including older adults (65 years of age or older) or individuals with heart disease, diabetes, asthma, or lung disease among other chronic conditions. While employers cannot directly ask about an individual's diagnosis, if it is aware of or provided notice that an individual falls within this high risk category, the employer should engage in the interactive process to determine whether the individual requires a reasonable accommodation.

Apply the interactive process as you would normally to determine if an individual can engage in the essential functions of his/her position with or without a reasonable accommodation. However, keep in mind this practice is flexible and may be done over the phone and even through email if necessary but be sure to document the individual's restrictions and any accommodations provided. Most reasonable accommodations for high risk individuals thus far have involved providing remote or telework opportunities to help avoid exposure to the disease.

Q: How Does Labor Code section 230.8 Apply to Leaves?

A: We have had many questions about how Labor Code section 230.8 applies to leaves taken to care for children whose schools have closed. That section provides for employees at worksites of 25 or more employees to receive up to 40 hours of leave per year for specific school-related emergencies such as the closure of a child's school or daycare by civil authorities.

However, for school employees, this leave is generally within personal necessity leave so long as the employee is entitled to 40 hours of that leave. If an employee is not entitled to 40 hours pursuant to the collective bargaining agreement, they would be entitled to the excess amount. For example, if a five hour employee were only entitled to 30 hours, they would be entitled to an additional 10 hours under Labor Code section 230.8.

We hope this guidance is helpful in this time of uncertainty. DWK will continue to provide guidance as information becomes available. For more information regarding the impact of COVID-19 on your district's operations, please visit our COVID-19 Resources page at https://www.dwkesq.com/covid-19-resources-page/.