

March 24, 2020

RE: Coronavirus Employment Matters

The impacts of the coronavirus pandemic (herein referred to as “COVID-19”) are sweeping and being felt by every industry and sector, presenting employers with difficult and unprecedented challenges. We are working diligently to prepare employers for an uncertain future and the long-term consequences of this rapidly changing public health crisis. This letter is intended to provide employers with guidance and resources to navigate difficult decisions. Given the fluid nature of the COVID-19 pandemic, we urge all employers to regularly check all sources cited herein, as agency guidance may change overtime.

MANAGING THE WORKFORCE

On March 20, 2020, Governor Cuomo issued Executive Order 202.6, which mandated that all non-essential services close by 8 p.m. on Sunday, March 22, 2020.

Essential and Emergency Employees

Employees who are designated as essential workers in essential businesses, as defined by the Governor Cuomo’s Order, can continue working. Employers may need to implement new policies to protect employees from potential exposure to COVID-19 and to address confirmed COVID-19 cases in the workplace. The Centers for Disease Control (“CDC”) maintains comprehensive recommendations to assist employers in developing these policies. We recommend adhering to CDC policies and recommendations to protect your employees, as doing so may also decrease employer liability for exposures in the workplace.

We recommend refraining from designating employees who are on temporary unpaid layoff as being “on-call.” While some personnel may only be called in on an as-needed basis, the “on-call” classification legally complicates such an employee’s status under current wage and labor laws. Accordingly, we recommend that employers identify all employees who are willing to return from an unpaid layoff to respond to emergencies.

Non-Essential Employees

At the employer’s discretion, non-essential employees may be directed to work remotely. In arranging for remote work, we urge all employees to continue complying with state labor laws with respect to breaks and overtime. Further, if hours must be reduced due to remote work, we recommend informing employees that they are entitled to partial unemployment benefits. We recommend maintaining a smaller number of full-time employees rather than a larger number of employees with reduced hours, as employees who are out of work will be able to recover a larger portion of their paychecks in unemployment than those who work reduced hours.

Based upon the operations and determination of the employer, all non-essential employees who cannot work from home may be notified in writing that, in accordance with Governor Cuomo’s Executive Order, they are being placed on temporary layoff. In the written notice, employers should clearly state “a temporary layoff caused by COVID-19.” The notice should further state, “At this time, the duration of the temporary layoff is unknown, given the fluid nature of this public health crisis. We do not know when we will employees to return to work, who will be contacted to return, or how many hours of work may be available for those who are contacted. Each employee will be contacted as soon as reasonably possible when this information is known.”

Employers should also encourage employees to apply for Unemployment Insurance and any other applicable assistance from the federal and state governments.¹ We recommend noting that “federal and state agencies, not employers, make all decisions with respect to an employee’s application for unemployment and other services.” It may be of some comfort to employees that New York State is waiving the 7-Day waiting period for Unemployment Insurance benefits for people who are out of work due to Coronavirus (COVID-19) closures or quarantines.² Employers may also wish to share with employees that New York State has arranged for a ban on evictions for residential properties, a delay in foreclosures, a moratorium on shutting off utilities, and deferred mortgage payments. These directives are currently in place for 90 days.

If your group health insurance plan allows, you may also wish to continue insurance coverage. Otherwise, your insurance provider must issue all COBRA notices to the employees at the time of the layoff.

Employers with more than 100 employees are required to adhere to notice requirements under the New York Worker Adjustment and Retraining Notification Act (“WARN”) when a mass layoff affects 33% of employees and at least 25 employees at a single site of employment within a 30-day period. Notably, California’s governor issued an executive order relaxing requirements under the WARN Act. We anticipate that Governor Cuomo could follow California’s lead could relax the usual notice requirements in New York. Nevertheless, there is an exception for unforeseen business circumstances applies when there is a sudden, dramatic, and unexpected action or condition beyond an employer’s control that was not foreseeable when notice ordinarily would have been required. It is unclear at this time if the COVID-19 pandemic creates an exception to these notice requirements. However, based on the definition of unforeseeable business circumstance, it is our position that most employers can reasonably argue that the coronavirus pandemic constitutes an unforeseeable business circumstance.

ONGOING LEAVE OBLIGATIONS

It is crucial that all employers continue to comply with federal and state laws regarding leave during this crisis. We recommend assessing each employee’s entitlement to leave under each pre-existing law prior to engaging in any employment action to reduce the employer’s risk of liability.

Family Medical Leave Act

Employers with 50 or more employees must offer 12 weeks of family leave for an employee’s “serious medical condition.” At this time, COVID-19 is not, itself, designated as a “serious medical condition” under FMLA

¹ For a step-by-step guide for filing an unemployment claim in New York State, please see <https://www.labor.ny.gov/ui/pdfs/Unemployment-Filing-Instructions.pdf>

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triggering employer obligations. However, leave should be offered for other covered conditions that are aggravated by COVID-19. Employees must report any need for such leave pursuant to reporting requirements applicable to all FMLA covered events. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same terms as existed before they took FMLA leave.³

New York State Paid Leave Act

The Paid Family Leave provides eligible employees job-protected, paid time off to bond with a newly born, adopted or fostered child; or to care for a family member with a serious health condition. New York State administers this leave, not the employer. Again, it is our position that a diagnosis of COVID-19 is not, itself, a serious health condition that would trigger a requirement to offer New Yorkers paid leave. Nevertheless, employers should be cognoscente of employees' entitlement such leave for independent or secondary serious health conditions. If an employee does need time off for a serious health condition, employers must offer 10 weeks of paid leave 60% of employee's average weekly wage, up to 60% of State Average Weekly Wage.⁴ However, this leave is arranged through the New York State; employers are not required to compensate employees during this time.

New York City Paid Leave

Similarly, employers in New York City should continue to comply with the New York City Paid Leave law during the COVID-19 pandemic. An employee may request to use sick leave when during the pandemic if the employer is closed if the affected employee has not been terminated. However, employers are not entitled to be paid for any accrued sick leave after a layoff, unless that benefit is provided for by employer leave policies. All employers in New York City with five or more employees must offer employees up to 40 hours of paid sick leave each calendar year to those who are employed to work more than 80 hours a calendar year paid sick leave. Employers with fewer than five workers must provide up to 40 hours of unpaid leave.

Anti-Discrimination Laws

Anti-discrimination laws at the federal, state, and local levels continue to apply to employers during the pandemic. The American's with Disabilities Act and Rehabilitation Act, New York State Human Rights Law, and New York City Human Rights Law requires all employers to provide leave as a reasonable accommodation to employees for employees with a qualifying disability. Federal and local agencies will not consider a diagnosis of COVID-19 to be a disability under these laws. However, employers must engage in the interactive process with all employees who have underlying conditions that are affected by the COVID-19 pandemic.⁵

³ The United States Department of Labor has issued guidance for addressing FMLA related leave in the context of the Pandemic, available at https://www.dol.gov/whd/healthcare/flu_FMLA.htm.

⁴ For more information about the application of New York Paid Leave, see https://www.ny.gov/sites/ny.gov/files/atoms/files/PaidFamilyLeave_EmployeeFactSheet.pdf

⁵ Please see guidance issued by the Equal Employment Opportunity Commission for more information on the applicability of the ADA in the context of COVID-19 pandemic, available at https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

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THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“FFCRA”) into law, effective within 15 days—April 2, 2020. As enacted, the law provides for two types of leave: Expanded Family Medical Leave and Emergency Medical Leave.

Federally Expanded Family Medical Leave⁶

The act is intended to serve as an amendment to the Family and Medical Leave Act (“FMLA”) to expand coverage to employees needing leave related to the coronavirus pandemic. The Act begins to take effect on April 4, 2020 and ends on December 31, 2020. Most drastically, the Act requires that all public employers and private employers with fewer than 500 employees, who have been on the job for at least 30 days, have the right to take up to 12 weeks of job-protected leave to care a child if schools have closed or their child care provider is unavailable due to COVID-19.

Although the first 10 days of this leave may be unpaid, the law provides that employees may substitute any available paid leave earned under the employer’s leave policies. However, please note that employers are prohibited from requiring that employee’s substitute paid leave. After the first 10 days, the remainder of the federal COVID-19 family leave is to be paid at a rate of no less than 2/3 of the employee’s regular rate for hours normally scheduled to work. The amount paid to each employee is capped at \$200 per day and \$10,000 in the aggregate.

At this time, it is our position that this leave does not extend to employees who have been laid-off temporarily, as the provisions of the law apply solely to individual circumstances and do not apply to mass business and industry closures. Further, there is some indication that the Secretary of Labor may exempt employers with fewer than 50 employees “for good cause when the requirements would jeopardize the viability of the business.” Nevertheless, we recommend continuing to extend coverage to all employees who have been unable to work due to childcare issues to avoid the appearance of retaliation. We continue to monitor all federal sources for updates on potential exemptions.

Note that employees taking COVID-19 related family leave are entitled to job protection similar to what is provided by FMLA. Thus, all employees on COVID-19 family medical leave should be returned to their positions following leave. However, the law provides that there may be special circumstances for employers with fewer than 25 employees – specifically when the position was abolished because of reasons related to the pandemic.

Federal Emergency Sick Leave

The Federal Emergency Sick Leave provisions of the law begin to take effect on April 4, 2020 and they end on December 31, 2020. The new law requires that employers with fewer than 500 employees provide all full-time and part-time employees, *regardless of how long they have been on payroll*, with paid sick leave if the employee has been placed in quarantine or isolation; has been advised by a healthcare provider to self-quarantine due to COVID-19; is experiencing symptoms of COVID-19 and is seeking medical attention; is caring for an individual subject to a quarantine order; is caring for a child due to lack childcare because of COVID-19.

⁶ The United States Department of Labor as issued interpretive guidance on H.R.6201 - Families First Coronavirus Response Act, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

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If an employee satisfies the above requirements, an employer must provide full-time employees with 80 hours of emergency paid sick leave. Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period. Note that employers with less than 500 employees are required, at the request of an employee, to pay a full-time employee for 80 hours of mandated emergency paid sick leave instead of the initial 10 days of unpaid leave permitted by the Emergency Family and Medical Leave Expansion Act, as detailed above. Paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others.

Again, at this time, it is our position that this leave does not extend to employees who are not working due to a layoff, as the provisions of the law appear to be solely applicable to individual circumstances and do not apply to facility and industry-based closures. However, while there is a very general exception for employers of healthcare providers or emergency responders, there is little guidance clarifying when employers can justify exempting such employees. As with the Emergency Family and Medical Leave Expansion Act, the Secretary of Labor was given authority to exclude certain businesses from these requirements. We continue to monitor federal agencies for revised interpretations of the law. In the meantime, it is our recommendation that employers extend coverage to all employees who meet the criteria listed above to ensure compliance with the law.

Tax Provisions

In addition to leave provisions, the Families First Coronavirus Response Act calls for tax credits for employers who pay employees coronavirus-FMLA leave and emergency paid sick leave. On March 20, 2020, the Internal Revenue Service announced that it would be releasing guidance the following week permitting eligible employers who pay qualifying sick or childcare leave to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid. Under this scheme, payroll taxes that are available for retention include withheld federal income taxes, employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes for all employees. The IRS further clarified that the impending guidance will create a process for employers to request an accelerated payment from the IRS if payroll taxes are not to cover the cost of qualified sick and childcare leave paid by employers. The IRS intends to process these expedited requests in two weeks or less. We will continue to monitor IRS guidance and rules over the next week.

THE NEW YORK STATE COVID-19 SICK LEAVE

The New York State COVID-19 Sick Leave Act was enacted on March 18, 2020 and is effective immediately. COVID-19 legislation signed by Governor Cuomo enables Paid Family Leave to be used by an eligible employee if they, or their minor dependent child, are subject to an order of mandatory or precautionary quarantine or isolation issued by the state of New York, the Department of Health, local board of health, or any government entity duly authorized to issue such order due to COVID-19.. Leave provided under the state bill cannot be offered “in addition to” federal benefits. The leave should only be offered to offset the difference of any benefits offered by the federal government.

The amount of leave that must be afforded is based on the number of employees an employer maintains. Employers of 10 or fewer must provide unpaid sick time during an employee’s period of ordered quarantine or

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isolation, except those employers with net income of more than \$1 million, which must provide five days of paid sick leave. Employers with 11 to 99 employees must provide five days of paid sick leave. Employers of 100 or more must provide 14 days of sick leave.

Again, at this time, it is our position that this leave does not extend to employees who are not working due to a layoff, as the provisions of the law appear to be solely applicable to individual circumstances and do not apply to facility and industry-based closures.

MITIGATION RESOURCES FOR EMPLOYERS

NYC Employee Retention Grant Program

New York City is offering all small businesses with fewer than 5 employees a grant to cover 40% of payroll costs for two months to help retain employees. To qualify for the grant, an employer must: be located within the five boroughs of New York City, demonstrate that the COVID-19 outbreak caused at least a 25% decrease in revenue, employ 1-4 employees in total across all locations, have been in operation for at least 6 months, and have no outstanding tax liens or legal judgements.⁷

NYC Small Business Continuity Fund

New York City employers with businesses with fewer than 100 employees who have seen sales decreases of 25% or more will be eligible for zero interest loans of up to \$75,000 to help mitigate losses in profit. To qualify for the grant, employers must: be located within the five boroughs of New York City, demonstrate that the COVID-19 outbreak caused at least a 25% decrease in revenue, employ 99 employees or fewer in total across all locations, demonstrate ability to repay the loan, have no outstanding tax liens or legal judgements.⁸

The Small Business Emergency Recovery Act of 2020

This law is currently in the New York Assembly. *If passed*, the proposal would provide immediate assistance to small businesses in New York that are being significantly impacted by the current COVID-19 outbreak. The law would provide for the creation of a 0% interest loan program dedicated to helping small businesses meet their payroll commitments; making available tax credits to help the needs of the state's existing small businesses; using all economic development discretionary funding for existing small businesses within New York state; moving tax deadlines for remittance, business tax, and personal income tax ahead 180 days, and suspending all regulatory fees on small businesses for 180 day period. We will continue to monitor the progress of this legislation.

U.S. Small Business Administration (SBA) Economic Injury Disaster Loan Program

The United State Business Administration has established working capital loans to help small businesses, small agricultural cooperatives, and small businesses engaged in aquaculture, and most private, non-profit organizations of all sizes meet their ordinary and necessary financial obligations that cannot be met as a direct result of the pandemic.

⁷ For more information on the New York City Retention Grant program, see <https://www1.nyc.gov/nycbusiness/article/nyc-employee-retention-grant-program>

⁸ To apply for the grant, visit <https://www.surveymonkey.com/r/ZL5N8XL>

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These loans are intended to assist through the disaster recovery period. Must have a good credit history and show ability to repay the loan.⁹

We encourage all employers to reach out to Matthew Feldman at mfeldman@feldmankieffer.com with any employment or other legal questions throughout the pandemic.

⁹ For more information, see <https://disasterloan.sba.gov/ela/>

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