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COVID-19 Legal Update as of March 26, 2020

As you are certainly aware, things continue to change quickly. Here is an update on the latest developments we thought you should know.¹

Emergency FMLA (Family and Medical Leave) and Paid Sick Leave

Effective Date:

- In our last update, we stated the law went into effect April 2, 2020. The Department of Labor's website states these laws go into effect April 1, 2020.

Coordination of Benefits:

- The Emergency FMLA provides for up to 12 weeks of leave for time off work to care for a child under 18 years old, if their school or place of care has been closed or their childcare provider is unavailable due to COVID-19.
- Although the FMLA provision states the first 10 days are unpaid, the Emergency Sick Leave Act provides full-time employees up to 80 hours of paid sick leave (a prorated amount for part-time employees). Therefore, these two laws together provide that the first two weeks of Emergency FMLA would be paid Emergency Sick Leave under most circumstances.
- Emergency FMLA does not provide 12 weeks of leave *in addition to* traditional FMLA. To the extent an employee has used traditional FMLA, those weeks count toward the 12 weeks available under Emergency FMLA. For example, an employee who earlier this year took 6 weeks of traditional FMLA for surgery would have 6 weeks of Emergency FMLA available.

Additional Resources:

- Department of Labor's (DOL) website with COVID-19 information: <https://www.dol.gov/agencies/whd/pandemic>
- DOL FAQs regarding employee rights to Emergency Paid Sick Leave: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>
- DOL FAQs regarding employer requirements for Emergency Paid Sick Leave: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>
- DOL FAQs on the Families First Coronavirus Response Act (FFCRA): <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- COVID-19 and the FLSA: <https://www.dol.gov/agencies/whd/flsa/pandemic>
- COVID-19 and **traditional FMLA**: <https://www.dol.gov/agencies/whd/fmla/pandemic>

¹ Consistent with our goal of helping prevent problems and litigation, we are providing this legal update. Please note this document contains only summaries of various laws and should not be considered a substitute for legal advice. Also, the legal landscape is rapidly evolving. Consult with an attorney if you have questions about any of the topics discussed.

New Required Poster

The FFCRA required the DOL to provide a poster that all employers with fewer than 500 employees must post in a conspicuous place.

- That poster is now available here:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- FAQs regarding where to display the poster:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

Temporary Non-Enforcement of FFCRA by the DOL

According to the DOL, they will focus on compliance rather than enforcement through April 17, 2020. From their website: <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1>:

Enforcement Guidance

The Department will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e. March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts “reasonably” and “in good faith” when all of the following facts are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practicable. As explained in a Joint Statement by the Department, the Treasury Department and the Internal Revenue Service (IRS) issued on March 20, 2020, this program is designed to ensure that all covered employers have access to sufficient resources to pay required sick leave and family leave wages.
2. The violations of the Act were not “willful” based on the criteria set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (the employer “either knew or showed reckless disregard for the matter of whether its conduct was prohibited...”).
3. The Department receives a written commitment from the employer to comply with the Act in the future.

If the public or private employer either (i) violates the Act willfully, (ii) fails to provide a written commitment to future compliance with the Act, or (iii) fails to remedy the violation upon notification by Department, the employee seeking payment, or a representative of that employee, including by making all affected employees whole as soon as practicable, the Department reserves its right to exercise its enforcement authority.

After April 17, 2020, this limited stay of enforcement will be lifted, and the Department will fully enforce violations of the Act, as appropriate and consistent with the law.

ADA (Americans With Disabilities Act)

Additional resources: The website we provided in our last bulletin has been **updated by the EEOC** to address COVID-19: https://www.eeoc.gov/facts/pandemic_flu.html.

Health Insurance

On March 20, 2020, the Ohio Department of Insurance issued a 2-page bulletin regarding continuation of health insurance benefits. That bulletin can be found here: <https://iop-odi-content.s3.amazonaws.com/static/Legal/Bulletins/Documents/2020-03.pdf>

If there is anything we can do to help your business, please let us know.