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Client Alert: Employer Guidance for COVID-19
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The recent outbreak of Coronavirus COVID-19 presents numerous obstacles and concerns for employers throughout the country.

By now, some of you have familiarized yourself with the Center for Disease Control (CDC) website and are looking at telework options for many of your employees. This client alert will not repeat some of the more general employer advice that is readily available.[1]

COVID-19 raises complex legal issues involving the following laws:

- Federal Emergency Legislation (HR 6201);
- Maryland's Emergency Legislation (MD House Bill. 1663);
- Americans wjth Disabilities Act (ADA) issues and obligations;
- Fair Labor Standards Act (FLSA) issues and obligations;
- Occupational Safety and Health Act (OSHA) issues and obligations;
- National Labor Relations Act (NLRA) issues and obligations;
- Worker Adjustment and Retraining Notification (WARN) issues and obligations;
- Unemployment issues; and
- Uniformed Services Employment and Reemployment Rights Act (USERRA (Military Leave)) issues and obligations.

For our purposes, and given the fast moving nature of this crisis, this Client Alert will serve to update you with respect to new employer obligations, and also summarize various laws that might impact your operations as you address COVID-19 in the workplace. As always, this advice is general and not specific for any specific employer/workplace.

HR 6201 – "Families First Coronavirus Response Act"

This legislation has passed both the House and Senate and was reportedly signed by the President, though at this writing I cannot determine the veracity of that claim.

There are several components of HR 6201 applicable to small employers (generally defined as those employers who have "fewer than 500" employees). The first is "Emergency

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[1] The Center for Disease Control's "interim guidance for businesses and employers," can be located here: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html. The Center for Disease Control also has "environmental cleaning and disinfection recommendations" located here: https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html

Paid Sick Leave" and the second is a temporary expansion of an existing Federal law, the Family Medical Leave Act (FMLA). We will briefly address each.

Emergency Paid Sick Leave (Section 5101 et seq.)

The Emergency Paid Sick Leave provision of HR 6201 (Division E, Section 5101), provides that an employer shall provide to each employee employed by the employer paid emergency sick leave (PESL) to the extent that the employee is unable to work (or telework) due to a need for leave because: (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2); (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; and (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. An exception exists for employers of an employee who is a health care provider or an emergency responder. In such case, an employer may elect to deny PESL to such an employee.

Full-time employees shall be entitled to receive eighty (80) hours of PESL. Part-time employee shall be entitled to PESL according to the number of hours that such an employee works, on average, over a 2-week period. Under HR 6201 (Sec. 5101), there is no carryover of PESL from one year to the next. An employer's obligation to provide this leave shall cease "beginning with the employee's next scheduled work-shift immediately following the termination of the need for paid sick time." An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time.

There will also be a notice (poster) requirement, but the U.S. Department of Labor has not yet issued the poster (we will alert you when it becomes available). The failure to provide PESL will be considered a violation of the minimum wage standards of the Fair Labor Standards Act (FLSA), exposing employers to the amount of the unpaid leave, liquidated damages, and potential statutory attorneys' fees.[2]

The calculation of the *amount* of PESL is also a bit tricky. Generally, you would pay PESL according to the employee's "regular rate" of pay (a defined term under the FLSA, which could include bonuses/commissions typically paid), but no less than the Federal minimum wage. (For my restaurant employer clients, you would pay tipped employees at $7.25/hour). PESL is also limited in the amounts an employer must pay. For the circumstances described in (1)-(3)

[2] HR 6201 clearly provides that any violations shall be considered a violation of the minimum wage provisions of 29 U.S.C. § 206, and that the employer will be subject to the "penalties" of §§216-17. While Section 216 of the FLSA provides for the recovery of attorneys' fees, it is unclear whether the award of attorneys' fees would be considered a penalty.

(above), PESL is limited per employee to $511 per day and $5,110 in the aggregate. For the circumstances described in (4)-(6), PESL is limited to $200 per day and $2,000 in the aggregate.

Finally, when the employee requires leave to care for a family member under any of the circumstances described in (4)-(6) (above), the required compensation shall be two-thirds of the amount of required compensation (this seems to suggest that tipped employees could be paid two-thirds of the Federal minimum wage, but I think further interpretative guidance from the Department of Labor is required here – the safest course might be to always pay at least the minimum wage of $7.25/hour).

Emergency Family Medical Leave Expansion Act (Section 3101)

This temporary expansion of FMLA will come as a real shock for many of you who have not been covered by FMLA due to your smaller size (FMLA generally covers employers who employ 50 or more employees).

Employers of fewer than 500 employees now will be required to provide leave of up to 12 weeks to employees (who need only have worked 30 calendar days to be covered) if the employee is unable to work (or telework), due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. The term 'public health emergency' means an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

The first ten days may go unpaid, but an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the unpaid leave. After the first ten days, the employer must provide paid FMLA leave, in an amount that is not less than two-thirds of an employee's regular rate of pay based on the number of hours ordinarily scheduled. The limit for the payment is $200/day and $10,000 in the aggregate. Generally, the employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment. However, job restoration rights are altered from the traditional FMLA requirements: an employee can be denied restoration if the position he/she held when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer, based on the public health emergency.

To be sure, these paid leave benefits are going to be very frightening in terms of cost to small employers. But there might be the prospect for some relief. First, the U.S. Department of Labor will be able to issue regulations to exempt employers of less than 50 employees – "when the imposition of such requirements would jeopardize the viability of the business as a going concern." Second, some of my health care clients should be aware that the exemptions may be allowed so that employers of health care providers and emergency responders can be excluded. We will alert you to developments in this area.

Moreover, small employers will (at least in theory) be able to afford to provide this leave because employers may be eligible to take a tax credit against their FICA liability. While the tax implications of this legislation are beyond this alert, if any of my clients or accountant friends would like to study these provisions further, they should look to Section 7001 of HR 6201.

2020 Maryland House Bill No. 1663,
Maryland 441st Session of the General Assembly, 2020,

While not signed by the Governor as of this writing, Maryland House Bill No. 1663, would give the Governor the right to prohibit an employer from terminating an employee solely on the basis that the employee has been required to be isolated or quarantined due to the COVID-19 emergency.

ADA

Generally, seasonal flu and other conditions of a short duration are not considered a disability under the ADA (29 C.F.R. § 1630.2(j); see EEOC: Pandemic Preparedness in the Workplace and the Americans with Disabilities Act). However, complications arising from illness caused by a pandemic influenza virus may lead to the condition becoming an ADA-covered disability. Under the ADA, an employer must provide a disabled employee with reasonable accommodations. However, there is no duty to accommodate where the disabled employee poses a "direct threat." The ADA also requires employers to protect employee health information and maintain it in a confidential manner.

For a good question and answer on employer obligations under the ADA in a pandemic situation, please see https://www.eeoc.gov/facts/pandemic_flu.html for very useful information from the U.S. Equal Employment Opportunity Commission.

FLSA

The FLSA requires generally employers to pay employees at least the minimum wage and to pay overtime to all non-exempt employees.

For a good question and answer on employer obligations under the FLSA in a pandemic situation, please see https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/flu_FLSA.pdf for very useful information from the U.S. Department of Labor.

OSHA

OSHA's "General Duty" clause requires employers to maintain a safe workplace.

For a good question answer on employer obligations under OSHA in a pandemic situation, please see https://www.osha.gov/Publications/influenza_pandemic.html for useful information from OSHA.

NLRA

Issues under the NLRA arise when an employee refuses to come to work, or refuses to perform work, due to concerns about contracting the pandemic influenza virus. To be covered by the NLRA, an individual's refusal to work based on employee concerns about safety and health must be concerted activity, meaning the employee is acting either (i) in concert with at least one other employee; or (ii) on behalf of other employees.

The threshold is low to satisfy the NLRA's concerted requirement for safety and health concerns. Under the NLRA, there is no requirement that an individual have a reasonable belief that a situation is unsafe in order to refuse to work. The reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. See NLRB v. Washington Aluminum Co., 370 U.S. 9, 16 (1962).

If the employee's belief is reasonable, an employer cannot replace the employee as a striker. Section 502 of the Labor Management Relations Act (LMRA), which amended the NLRA, states that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work" is not deemed to be a strike. 29 U.S.C. § 143.

Employees are not required under Section 502 to prove the existence of abnormally dangerous working conditions. All that is required is a good faith belief, supported by ascertainable, objective evidence, that their working conditions are abnormally dangerous. If an individual satisfies this Section 502 reasonable good faith belief element, the employee who refuses to work may not be replaced.

However, if there is no immediate danger to employees based on the Section 502 good faith belief standard, employers generally can bring in replacements and permanently replace an employee who refuses to work because of safety concerns or issues.

WARN

Generally, the WARN Act prohibits larger employers from engaging in a "mass layoff" or a "plant closing" without giving 60 days advanced notice. Exceptions from this notice requirement apply to employers in "natural disasters" and "unforeseeable business circumstances." Employers who may be considering a mass layoff or plant closing should contact us for advice and guidance.

Unemployment

As of this writing, it is too soon to determine whether an employer's unemployment insurance rating will be impacted by COVID-19 related layoffs.

However, for a good question answer on COVID-19 and unemployment benefits under Maryland law, please see https://www.dllr.state.md.us/employment/uicovidfaqs.shtml (Please note that this information is subject to change depending on the enactment of relief legislation).

USERRA (Military Leave)

Employees who are members of the National Guard or Reservists called to duty to help during a pandemic are entitled to military leave and reemployment rights under USERRA. In my opinion, USERRA is one of the most pro-employee laws that exists and has some counter-intuitive requirements.

Employers who have questions regarding the application of USERRA to an employee in their workforce should contact us for advice and guidance.

In conclusion, this Client Alert is intended to provide you with general information for issue spotting and quick reference. Please do not hesitate to reach out to us for any assistance, as to these and any other issues.