COVID-19 Updates from Laner Muchin

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What a few days it has been! Only a week ago we were answering questions about how to handle an employee who has symptoms of COVID-19 and encouraging clients to create preparedness plans. In this edition of the *Fast Laner*, we discuss the most pressing issues facing employers right now.

Illinois Issues Stay-At-Home Order

On March 20, 2020, Illinois Governor J.B. Pritzker issued a Stay-At-Home Order requiring individuals living within the State of Illinois to stay at home and to leave only for health and safety; for necessary supplies and services; for outdoor activities; and to perform work for an essential business. Our coverage is here. The Governor's order is here.

The Families First Coronavirus Response Act

The much anticipated Families First Coronavirus Response Act ("FFCRA") is now law and goes into effect April 2, 2020. It contains sweeping emergency paid sick leave and paid FMLA requirements for employers with less than 500 employees, as well as government employers. It expires on December 31, 2020. Our complete analysis of the FFCRA can be found here.

Our Updated Guidance

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Last week, we issued guidance to assist employers with navigating the impact of COVID-19 on the workplace. So much has happened that we updated our guidance, which can be found here.

OSHA: Keeping Employees Safe

As employers receive more information about the COVID-19 pandemic, they have important questions about how to keep their employees safe at work and what are their legal obligations to do so. While every work environment may be different and the risks may vary to some extent, we have prepared guidance to answer some commons questions that clients are asking. Our OSHA Guidance is here.

Taking the Long View: Furloughs, Layoffs, And Reducing Wages

There is no question that the COVID-19 pandemic upended business with lightening speed. Businesses are considering all options in the face of such economic uncertainty. The most common question is whether there is a legal distinction between a furlough and layoff. The answer is yes and no. For non-union and non-government employers there is no legal significance to the term "furlough." In practice, a furlough is reducing days an employee works. Furloughs are typically of limited duration with the understanding that the employee is still actively employed. Furloughs can be paid (i.e., by the employer with continuing payroll or by requiring employees to use vacation) or unpaid (for non-exempt employees only if less than the entire workweek and for exempt employees only if the furlough is a full and entire workweek). Employers can implement furloughs without giving employees notice.

A layoff can be temporary or permanent involving continuous week(s) off. Many clients ask if a layoff is a termination. In many cases, a layoff is a termination that may give rise to paying earned, but unused vacation/PTO, issuing a COBRA notice, and entitling employees to unemployment benefits. Whether a layoff is a termination will depend on the circumstances, such as whether the layoff is of a limited duration. Employers with union employees should refer to their collective bargaining agreement to determine whether a layoff is a termination and other obligations when implementing layoffs of union employees. Even temporary layoffs may trigger COBRA notice requirements as most fully-insured group health plans provide that eligibility for coverage ceases as of the end of the month in which the layoff occurs. If you have questions about this obligation, consult with your Laner Muchin servicing attorney.

A layoff becomes legally significant if the layoff is large enough and long enough that an employer must comply with federal and some state requirements that employees, unions and state and local government officials be given 60 days' advance written notice of the layoff. The federal law is called the Worker Adjustment and Retraining Notification Act ("WARN") and many states have their own "mini-WARN" laws.

Of course, few of us had any notice that our businesses would be impacted this quickly, let alone knowing 60 days in advance. Luckily, the WARN notice requirements under federal and state laws do not apply in some instances. For example, notice is not required for layoffs of less than six months. If a layoff was intended to be less than six months and it ends up being longer, employers would only have to provide WARN notice when it is apparent that the layoff will exceed six months. Additionally, depending on whether there is a layoff or a closing of a facility or plant, federal and state WARN laws provide for exceptions in the event of unforeseen business circumstances or a physical calamity. This week California suspended its WARN notice requirements in cases where an employer could not give notice due to unforeseen business circumstances due to the COVID-19 pandemic. A more detailed explanation of WARN is here.

Pay Issues

Some employers are looking for a more incremental approach than layoffs. Employers can easily reduce the hours and pay rates of non-exempt employees, and they do not have to pay non-exempt employees while on layoff. Keep in mind that some states, like Illinois and New York, require employees to receive notice of pay rate changes in writing and in advance of the change.

It is trickier with exempt employees who must be paid a guaranteed salary regardless of the amount of hours worked. A particular challenge is for industries that have completely shut down like restaurants, but still have some exempt staff working. Employers have some options to address these challenges. Exempt employees who work less than an entire workweek because of a furlough or reduction of work still must be paid a guaranteed salary. However, an employer can require that the exempt employee use vacation/PTO on days when the employee does not work. For example, an exempt employee works Monday and Tuesday, but not Wednesday through Friday. An employer would still comply with the salary requirement by paying the exempt employee for Monday and Tuesday and “dock” the employee’s vacation/PTO bank to pay them for Wednesday through Friday. This is permissible even in less than a full day increment where an employee works four hours and is required to use four hours of vacation/PTO.

Another option is to not take the exemption. Employers are not required to avail themselves of the overtime exemptions. An employer can reclassify the exempt employee to nonexempt and pay the employee by the hour. The downside is that the employee is now entitled to overtime and the employers must record the employee’s hours worked. After things settle down, an employer can change the status to exempt again by paying the guaranteed salary. Assuming that the employee was properly classified as exempt in the first place, moving them back to exempt status would not undermine the exemption.

A final option is to reduce the employee's salary. It is always risky to tinker with an exempt employee's salary, but an employer can reduce wages as long as the wage reductions are not tied to hours worked and are not so frequent that they may be viewed as an attempt to evade the salary requirements.

What About Health Insurance Benefits?

As a result of the COVID-19 pandemic, an employee may lose eligibility for health benefits if they do not work for a prolonged period of time because of a medical condition, furlough, or a layoff.

The FMLA gives eligible employees time off of work for the employee's or their spouse or child's COVID-19-related medical issues, and the FMLA has been expanded to include taking time off to care for a child whose school is closed due to a public health emergency. As a result, employers will see more employees on FMLA. While on FMLA, health benefits (i.e., medical, dental, vision, EAP, health care FSA, HRA, and certain wellness benefits) must be continued during the leave. If a leave of absence is non-FMLA, or the FMLA period has ended, then an employer should evaluate whether the employee is still eligible for health benefits under the plan as many health plans are based on hours worked in a month. If the employee loses coverage, an employee should be placed on COBRA.

Another way an employee can lose health benefits coverage is during a prolonged furlough or layoff. Like a non-FMLA leave situation, eligibility for health benefits is typically based on hours worked in a month. If a furlough or layoff exceeds a month, then it is likely that an employee may lose coverage triggering COBRA. Employers should regularly evaluate whether a temporary furlough or layoff has resulted in employees losing health benefits coverage. Additionally, employers should review the terms of their current plan or policy as there may already be provisions that allow for extended coverage during a leave of absence, furlough or temporary layoff.

There is a nuance for employers who use a "look back" measurement method for purposes of the Affordable Care Act's employer mandate rules. Under such rules, eligibility and coverage may need to be maintained until the end of the then-current "stability period." In most cases, COBRA would apply following the end of the stability period if the employee is on a continued leave.

If eligibility for health care benefits is maintained during a leave, the employer may collect the employee's share of the premium to maintain the coverage during the paid or unpaid leave of absence. There are three ways to collect the premium- pre-pay, pay-as-you-go, and catch-up. In cases where there is paid leave, the employer may collect those premiums through payroll reductions under the cafeteria plan. However, for periods of unpaid leave, if the "pay as you go" method for collection is utilized, the employee would remit

those amounts to the employer on a post-tax basis. For the catch-up method, collecting premiums may present administrative challenges when the employee returns to work because wage payment laws may apply. If the employee fails to pay the required premium, coverage may be terminated for non-payment. Please note that special rules apply for collecting premiums and terminating coverage during an FMLA leave.

If an employee loses coverage, it is important to send out the COBRA notices on a timely basis (i.e., within 44 days of the qualifying event) and transition an employee to COBRA coverage because penalties apply and the insurance carrier or stop-loss carrier may later deny claims. Also, if coverage is terminated due to a failure to pay a required premium, COBRA would not apply but the circumstances of these particular cases should be reviewed carefully.

Another important point to consider is that employers that wish to amend their respective health plans or policies to extend coverages offered during a leave of absence or temporary layoff, need to consult their applicable insurance carrier or stop-loss provider before doing so. Otherwise, the applicable insurance carrier or stop-loss provider may later deny the extended coverage.

Finally, eligibility for disability and life benefits may be impacted due to the leave of absence due to active-at-work eligibility requirements. This respective insurance carriers should be consulted about how they interpret the eligibility terms of the plan or policy and whether any exceptions are being made at this time.

Senate Introduces Coronavirus Aid, Relief, and Economic Security Act ("CARES")

On March 19, 2020, Senator Mitch McConnell introduced bill S. 3548 in the Senate, entitled the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. In its present form, the CARES Act would provide for, among other things a vast increase in the eligibility of certain employers with less than 500 employees for emergency loans under the Small Business Act.

The amount of the emergency loan for which employers would be eligible is either (1) four times the average monthly payments the employer makes for payroll, mortgage payments, rent payments, and specified debt obligations; or (2) $10,000,000, whichever is less.

The allowable uses for the emergency loan under the CARES Act would be payroll support, employee salaries, mortgage, rent, utilities, and specified debt obligations. All eligible employers who are in operation on March 1, 2020 and have employees for whom the borrower paid salaries and payroll taxes would be eligible for emergency loans. Finally, portions of the loans would be forgiven based upon payroll costs

incurred during the covered period, *i.e.*, March 1, 2020, through June 30, 2020, though such loan forgiveness would be subject to certain deductions based on levels of employer staffing and employee compensation.

Amendments to the CARES Act have been proposed that would suspend Federal payroll taxes for 2020 and to enhance the 2020 recovery rebates for individual taxpayers, though no further specifics are presently available.

As with all proposed legislation, the CARES Act is likely to be subject to further amendments. We will track the progress of this bill and provide further updates.