NEW REGULATIONS –For Paid “Sick Leave” and FMLA Leave

In a new 125-page “Temporary Rule” (containing regulations), the Secretary of Labor (“Secretary”) issues temporary regulations to implement public health emergency leave under Title I of the Family and Medical Leave Act (FMLA), and emergency paid sick leave to assist working families facing public health emergencies arising out of Coronavirus Disease 2019 (COVID-19) global pandemic. Although presently only a "Public Inspection Document," formal publication is expected on April 6, 2020. The publication is available through these links:


This publication provides much more information than previously available regarding issues that many have been writing about, but without the benefit of regulations. While not perfect and not answering every question, it is a great read for anyone wanting to understand nuances of the new law. Although much of the content of the regulations was already fairly clear in the law itself, examples of issues discussed include:

1) There is no private right of action for a violation of the new 3 month FMLA law if the employer has fewer than 50 employees, although the Wage and Hour Division still has enforcement power. That means claims by employees for the FMLA portion might not survive a motion to dismiss by smaller employers, but such employers could still face action by the Department of Labor. Furthermore, of course, other claims such as under state whistleblower statutes might still prevail even against small employers, depending on the law and facts. There is a private right of action against employers with 50 or more employees for violation of the new FMLA law.

2) For the "sick leave" piece, a claim can be brought in court for the unpaid minimum wage for the “sick leave” purpose, as established in the new law, plus a double damage plus attorneys’ fees remedy.
3) As with “normal” FMLA, an employee is not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether he or she took leave. In order to deny restoration to employment, an employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

4) Also as with “normal” FMLA, an employer may deny job restoration to key Eligible Employees, as defined under the FMLA (29 CFR 825.217), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer.

5) Record keeping obligations require retaining records for 4 years – including those when leave is granted or denied.

6) Regarding the tax credit, the regulations state “an [e]mployer is advised” to maintain the following records:

- Documentation to show how the employer determined the amount of paid sick leave and expanded family and medical leave paid to employees that are eligible for the credit, including records of work, telework and paid sick leave and expanded family and medical leave;
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
- Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
- Copies of the completed IRS Forms 941 that the employer submitted to the IRS or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer’s entitlement to the credit claimed on IRS Form 941; and
- Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

For more information regarding taxes, see this link:


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