

## Monthly Minute Memo: *Update for Employers regarding the Coronavirus*

With the recent declaration of a public emergency due to the coronavirus outbreak resulting in the cancellation of large events and the closing of restaurants and bars in Illinois and other states, there is uncertainty regarding employee-related issues during this time. While there is uncertainty, the following provides what we do know regarding the evolving legislation and emergency rules enacted in Illinois and those in progress at the federal level.

### **I. Illinois Department of Employment Security**

The Illinois Department of Employment Security (“IDES”) recently enacted emergency rules to assist those employees whose unemployment is attributable to the coronavirus. These rules do not apply to employees who have already received the maximum 26-weeks of benefits. The rules differentiate between employees laid off and employees who resign or leave work due to the coronavirus. If an employee is laid off temporarily due to the coronavirus, the IDES takes the position that the employee is qualified for unemployment benefits so long as he or she is able and available for and actively seeking work. Under the emergency rules, an employee is considered actively seeking work if the individual is prepared to return to their job as soon as the employer re-opens the business. On the other hand, if an employee resigns due to concerns over the coronavirus, the IDES states that eligibility depends on whether the facts of his/her case demonstrate that the employee had “good reason” for quitting and that reason was attributable to the employer. While there are currently no IDES examples of what fact would be attributable to an employer, employers should take steps to provide a safe work environment for all employees during the coronavirus outbreak. However, if an employee quits because their child’s school is temporarily closed, this employee is considered by the IDES to have left work voluntarily without a good reason attributable to the employer and may be disqualified from receiving unemployment benefits. For more information: <https://www2.illinois.gov/ides/Pages/COVID-19-and-Unemployment-Benefits.aspx>

### **II. Federal legislation**

On March 14, 2020, the U.S. House of Representatives passed H.R. 6201, Family First Coronavirus Response Act (the “Act”), in response to the coronavirus pandemic. The provisions of this bill continue to evolve. The Senate is expected to have hearings on the bill this week, although nothing has been scheduled yet. Given the uncertainty of whether the current bill will be amended by the Senate or if the Senate will draft its own resolution, the following is a summary of what the current H.R. 6201 provides for at this time. H.R. 6201 is not yet considered “law”, and will inevitably change during this process, and, it may not ever become law. KD will provide updates as they are available.

#### **Pending Emergency Family Medical Leave Expansion Act**

- Provides additional leave under FMLA for coronavirus related issues during a public health emergency, from enactment through December 31, 2020.

- Changes eligibility criteria, as an employee who has been employed for 30 days is eligible and applies only to employers with fewer than 500 employees.
- First 10 days may consist of unpaid leave, unless an employee elects to substitute other accrued leave. After the 10-day unpaid leave, the employer is required to provide paid leave.
- Pay is calculated at not less than 2/3 of an employee's regular rate of pay and leave is generally calculated based on the number of hours the employee would normally work. Paid leave cannot exceed \$200 per day and \$10,000 in the aggregate.
- If the employer has less than 25 employees, restoration to previous position is not required if the position is not available due economic conditions due to a public health emergency.

#### **Pending Emergency Paid Sick Leave Act**

- Employer is required to provide paid sick time if an employee is unable to work (or telework) due to coronavirus related issues during a public health emergency through December 31, 2020.
- Employer and employee definitions under this Act follow the definitions under the FMLA.
- Full-time employees are entitled to 80 hours of paid sick leave; part-time employees are entitled to the average number of hours worked over a 2-week period.
- Sick leave can be used immediately for coronavirus related issues, regardless of how long the employee has been employed.
- Employer cannot require the employee to use other forms of paid leave before using paid sick time leave under this Act.
- Employer is required to post a notice in a conspicuous place regarding the rights under this Act.

#### **Pending Tax Credits for Paid Sick and Paid Family Leave**

This bill provides tax credits for paid sick and paid family leave for those employers who fall under the Act. Sick leave for taking care of a family member related to the coronavirus is capped at \$200 a day. Sick leave for an infected (or exposed) individual is capped at \$511 a day. For any family leave taken under this Act, the tax credit is capped at \$200 a day and capped at \$10,000 per quarter.

### **III. Practical Guidance and Other Important Issues for Employers to Consider**

#### **Working Remotely**

One alternative to shutting down a business, is to allow employees to work from home. While this is not the solution for certain businesses (i.e. restaurants and bars), many businesses may be able to continue operations with employees working off-site. However, employers need to make sure there is a clear policy, with clear expectations for all employees while working from home. Details should include issues such as start and stop times, availability, productivity standards, confidentiality, and establish a plan for conference calls or virtual meetings. Additionally, if employees are non-exempt hourly employees, the employer must ensure that the employees are appropriately recording their hours and affirming that the recorded hours are accurate and reflect all hours worked by the employee during the listed period. Also, it is important to note that in the event an employee has an accommodation in place, that accommodation may transfer if the employee is working from home.

#### **Lack of Work**

If an employer is not able to continue operations with employees (or all employees) working remotely, an employer may need to reduce work hours or to close (particularly if forced to close due to a government mandate). In reduced hours or closure situations, whether employees are entitled to wages depends on whether they are exempt or non-exempt. Non-exempt employees are only required to be paid for the hours they work. Thus, if a non-exempt employee is not performing work (for whatever reason), an employer is not required to pay the employee. An employer may allow employees to use earned paid time off for days an employee cannot work or is not working.

On the other hand, exempt employees are required to be paid their guaranteed salary when they perform *any* work during their workweek. Generally, if an employee is ready, willing and able to work, the guaranteed salary cannot be reduced when work is not available—however, there are some narrow exceptions to this rule that would need to be evaluated on a case-by-case basis. An employer can substitute or reduce an exempt employee’s earned leave bank (or run a negative leave balance) for the time an employee is absent from work due to lack of work.

Please keep in mind that depending on the number of employees effected, an employer may need to take into consideration WARN Act (state and federal) issues and/or other applicable laws.

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