March 23, 2020

Client Alert – Employment Law
North Carolina's Executive Order Regarding Restaurants, Benefits, Paid Leave, OSHA, and Other Issues
COVID-19 (Coronavirus)

As the COVID-19 situation continues to develop, the employment landscape is changing quickly. This Client Alert addresses a variety of the recent changes and other employment issues.

North Carolina Executive Order 118

Executive Order 118 focuses on two things: closing restaurants and expanding unemployment benefits eligibility. Here are some of the highlights:

1. Restaurants and bar closure.

    a. As of 5:00pm tomorrow, Tuesday, March 17, 2020, and continuing until March 31, 2020 (unless the Order is rescinded), all restaurants and bars are closed except for carry-out, drive-through, delivery and onsite consumption in outdoor seating areas where staff and patrons can maintain six foot social distancing (subject to additional mass gathering restrictions).
        i. Restaurants are defined as permitted food establishments and other establishments that both prepare and serve food, including but not limited to:
            1. Restaurants;
            2. Cafeterias;
            3. Food halls;
            4. Dining halls;
            5. Food kiosks at airports and shopping centers or educational institutions, ("food courts"); and
            6. Private or members-only clubs where food and beverages are permitted to be consumed on premises.
        ii. Bars are defined as establishments that are not restaurants and that have a permit to sell alcoholic beverages for onsite consumption.

    b. Venues that provide for the sale of beer, wine, and liquor for off-site consumption only are excluded as are production operations at breweries, wineries, and distilleries.

    Grocery stores, pharmacies, convenience stores, gas stations, and charitable food distribution sites are also excluded to the extent they sell or distribute prepared food. Sit-down food or beverage service within these facilities is prohibited.

2. Unemployment benefits

    a. DES will waive:
        i. The one-week waiting period for benefits;

ii. The requirement that applicants be able to work and available to work and the work search requirements; and
iii. The "actively seeking work" and the "lack of work" requirements.

b. Unemployment charges related to COVID-19 will not be allocated to the employer.

c. All mandatory in-person contact with individuals seeking unemployment benefits is postponed and the DES will utilize phone and online filing and reporting.

3. For those wondering whether the Governor can order a quarantine in North Carolina – yes, he can. North Carolina law authorizes the Governor to quarantine (limit the freedom of movement) of people and animals exposed to or are reasonably suspected of having been exposed to a communicable disease or communicable condition for a period of time as may be necessary to prevent the spread of that disease.

4. Update – a new order is being issued today that all North Carolina K-12 public schools are closed until at least May 15.

Benefits Issues

1. **If an employer furloughs an employee, is the employee still eligible for group medical plan coverage?**

Different plans have different rules. You will need to review your plan to know for certain. Look for a provision in your plan that dictates whether employees who are no longer "actively at work" may continue active coverage. You can find this information in several places: in the plan itself, the SPD, and the certificate of coverage should each tell you that. Most plans provide that an employee who is not actively at work may only continue coverage for a designated period. After the expiration of this designated period, active coverage will be terminated, and the covered employee will be eligible for COBRA.

Employers with self-funded plans often have more flexibility and can amend their plans to waive eligibility conditions to allow furloughed employees to continue coverage. Note, however, that an employer with a self-funded plan that wants to waive the actively at work requirement or otherwise extend coverage while employees are on leave would need to obtain the consent of their reinsurance carrier. It is not easy, but it is also not impossible, for a fully insured plan to make a similar amendment.

Employers utilizing an ACA (Affordable Care Act) lookback and stability approach to determine full-time status for health plan purposes must consider whether the affected employees are in a stability period that would result in continued eligibility for the duration of the stability period. Reduced hours in 2020 might impact the employees' full-time status for the next stability period (e.g., 2021 for plans using a calendar year stability period). Employers need to consider whether to provide relief for such employees in future stability periods.

2. **If an employee is on leave because he or she is experiencing coronavirus-like symptoms, is the employee eligible for group medical coverage?**

Probably. The first question is whether the employer is subject to the FMLA. If yes, then the leave is likely protected by both the FMLA and the E-FMLA, meaning that continued group medical coverage must be provided during FMLA leave, and the employer's policies regarding payment for coverage during FMLA-qualifying leaves

will apply. With the newly expanded E-FMLA rules, more employers are covered, but leave under the E-FMLA is limited to one qualifying event.

The answer will depend on whether the leave the employee is taking is protected FMLA or E-FMLA leave. If the employer is not subject to the FMLA or the E-FMLA or if the leave taken is not FMLA or E-FMLA leave, then the plan's applicable policies and procedures regarding continued coverage during periods of sick leave will apply, as well as the plan terms and the ACA full-time measurement and stability issues noted above.

3. **If employees are furloughed without pay and group medical coverage is continued, how should the premiums be paid?**

An employer can send the employee an invoice during the period of leave asking the employee to pay it.

An employer could opt to pay the premiums for the employees to ensure that the coverage remains in place and require the employee to reimburse the employer for the employee's share of the premium when they return to work. Depending on the applicable state law, the employer might be able to deduct the employee portion of the premiums pre-tax when the employee returns to work.

4. **Can employees take hardship withdrawals from a 401(k) plan if they are furloughed without pay?**

This is another "it depends" situation. The 401(k) plan will have rules regarding when the employee is eligible for a hardship distribution. Generally, a period of prolonged unpaid leave will usually not constitute a covered hardship (although payment for medical expenses incurred in connection with treating COVID-19 would likely qualify).

If the plan's rules rely on "relevant facts and circumstances," then prolonged financial instability may qualify. Note that adopting the relevant facts and circumstances approach will create an administrative burden on the employer to review each participant's financial situation.

Leave-sharing issues

When the President declares a national emergency, special rules come into play regarding the tax treatment of employer-sponsored leave banks.

Generally, the employee who donates PTO/leave/vacation time will be treated as having W-2 compensation for the donated time (based on his or her rate of pay at the time of the donation). This rule is based on the long-standing "assignment of income" tax law doctrine.

There are several limited exceptions to the general rule:

1. Medical leave-sharing plans.
2. Major disaster leave-sharing plans.
3. Leave-based donations of cash to charitable organizations in the case of qualified disasters, including an exception for Major Disaster Leave-Sharing Arrangements.

If an employer sponsors a "major disaster leave-sharing plan" that qualifies:

1. Employees who donate leave will NOT be taxed on the donated leave time.

2. Employees who use donated leave will be taxed on the donated leave time used (e.g., the donated leave time used is treated as W-2 wages for income and employment tax withholding).

"Major Disaster Leave-Sharing Plan" Requirements

1. Employer must have a written plan that:

    a. Allows a leave donor to donate accrued leave to an employer-sponsored leave bank for use by other employees **adversely affected** by a major disaster/**emergency**. An employee is considered "adversely affected" if the emergency caused severe hardship to the employee or a family member requiring the employee to be absent from work.

    b. Does not allow the donor to donate to a specific recipient.

    c. Restricts the amount of leave that can be donated to the maximum amount of leave the donor normally accrues in a year.

    d. Limits the recipient's use of the leave for purposes related to the major disaster.

    e. Imposes a reasonable limit, based on the severity of the disaster, on the period of time after the major disaster occurs during which a donor may donate and a recipient must use the leave.

    f. Prohibits a recipient from converting leave received under the plan into cash in lieu of using the leave.

    g. Requires a recipient to use donated leave to eliminate a negative leave balance that arose from advanced leave advanced attributable to the disaster/emergency.

    h. Requires the employer to make a reasonable determination, based on need, as to how much leave each approved recipient may receive under the plan.

    i. Provides that any donated leave that remains unused at the end of the period specified in the plan be returned to the donor(s) in the same proportion as the donation.

If a leave-sharing arrangement does not meet these requirements, then the donating employee MUST be treated as having W-2 compensation for the donated time (based on his or her rate of pay at the time of the donation).

Any payments received by an employee using donated PTO/leave/vacation time under the program must be treated as W-2 wages for all income and employment tax withholding purposes.

Employment eligibility (I-9) changes

DHS has temporarily deferred the "physical presence" requirements for Form I-9 completion.

Employers with remote operations may inspect a new employee's identity and work authorization documents remotely (e.g., via webcam or email).

Employers must subsequently physically inspect the documents by May 19 or within three business days of the resumption of normal business operations or the termination of the national emergency (whichever comes first).

OSHA

OSHA has issued new recommendations in response to COVID-19. OSHA recommends that employers:

1. Develop an Infectious Disease Preparedness and Response Plan that addresses COVID-19 contingencies.
    a. How the employer will handle the need for workers to be absent and/or work remotely.
    b. Whether, and to what extent, the employer will alter its operation levels in light of anticipated supply and demand changes.

2. Implement Basic Prevention Measures - the need for employers to implement and encourage best practices for minimizing the spread of COVID-19:

3. Provide hand washing areas, tissues and trash cans for employees, customers and the public.

4. Encourage sick employees to stay home.

5. Minimize non-essential travel.

6. Minimize contact between employees, clients and customers where possible (e.g., virtual meetings).

7. Discourage employees from sharing phones, desks and other equipment where possible.

8. Consider flexible work hours, staggered shifts, and telecommuting to increase distance between employees and reduce the number of employees physically present at one time.

9. Identify and Isolate Sick Individuals. Employees should self-monitor for symptoms and should know when and to whom they should report if they do get sick. Those who are potentially infectious should be sent home or otherwise physically moved away from other employees, customers, and visitors.

10. Develop, Implement and Communicate About Workplace Flexibilities and Protections. Employers must be flexible and non-punitive with their leave policies to ensure that sick employees do not feel like they must come to work and that other employees have the flexibility they need to care for sick family members. Employers should not require doctors' notes for employees who have respiratory illnesses when medical facilities are overloaded and unable to provide paperwork in a timely fashion. Each employer should also provide guidance and training to all employees to make sure they are aware of the employer's policies and plans related to COVID-19, as well as the availability of medical screening and other employee health resources.

11. Implement Workplace Controls.
    a. Engineering controls (measures that do not rely on employee behavior, e.g., HEPA air filters);
    b. Administrative controls (the policies described above); and
    c. Personal protective equipment (PPE).

i. Employers must evaluate their workplace specific hazards in selecting PPE and should make sure employees know how to properly fit, wear, use, remove, and clean the PPE.
ii. Employees who are required to work with known or suspected COVID-19 patients must have respirators and other protective equipment as necessary.
iii. There are no COVID-19 specific OSHA standards, but existing safety standards may apply depending on the nature of the employer's workplace (e.g., PPE standards and blood-borne pathogens standard).

ADA compliance and COVID-19

Businesses generally may not prohibit third parties (e.g., customers) access to places of public accommodation on the basis of a disability.

That raises the question - is COVID-19 a disability (or could it be perceived as a disability)?

1. The answer is not clear. The ADA requires businesses to analyze, on a case-by-case basis, whether a condition "substantially limits one or more major life activities." Further, unlike other provisions of the ADA, the public accommodations title does not exclude temporary conditions. Businesses should not, therefore, rely on a blanket exclusion from the ADA for COVID-19 when evaluating their obligations to the public.

2. However, even if COVID-19 were to fall under the ADA, businesses must take steps to protect their workplaces. Under the ADA, businesses may restrict access to individuals who pose a "direct threat" to others. Because of the global response to this virus, including the designation of a national emergency, screening for COVID-19 symptoms will likely be appropriate under the ADA's direct-threat analysis.

3. Businesses, therefore, may be able to inquire of entering customers or visitors whether they are experiencing or have been in close proximity with others experiencing or exhibiting, COVID-19 symptoms.

    a. To the extent customers answer in the affirmative, it would be reasonable under the ADA to deny entry to such individuals as they could pose a direct threat of disease spread at the work location.

    b. Importantly, the inquiry should be focused on symptoms of COVID-19 (as articulated by the Centers for Disease Control and Prevention and other recognized organizations) as opposed to general inquiries about the individual's health.

4. Even without an inquiry, businesses may prohibit individuals exhibiting or experiencing symptoms associated with COVID-19 from entering their premises. To minimize exposure, businesses can communicate this request via signs on the door or in the parking lots of their facilities, through social media, and/or via email distributions to their customers so customers are likely to see this request before they enter the business premises.

5. To the extent practicable, businesses should also consider whether and how they can provide products and services without risking the contamination of the workplace (e.g., online, telephone, drive-through services, etc.) to help mitigate the risk of a public accommodation denial claim.

Shelter-In-Place Orders

A shelter-in-place order is not (yet) in effect in North Carolina. If one is ordered, it is likely that the order will be directed at urban centers and perhaps not at rural communities. However, many states have issued such orders, and questions have arisen as to what might be expected if one were to be issued here. Note that

Each state issues its own order, and the orders vary from state to state. But, using Pennsylvania as an example, here is an overview as to what the Pennsylvania and Philadelphia orders require (both the city and state issued orders).

The Pennsylvania (state) order.

> Ordered the closure of all dine-in restaurants and bars in five counties and strongly urged all non-essential Pennsylvania businesses to follow suit and voluntarily cease operations for 14 days. Such businesses may continue to offer carry-out, delivery, and drive-through food and beverage service.

2. Included non-essential businesses subject to recommended closure those that are public facing, such as:
    a. Entertainment, hospitality, and recreation facilities, including, but not limited to, community and recreation centers;
    b. Gyms, including yoga, barre, and spin facilities;
    c. Hair salons and barber shops, nail salons, and spas;
    d. Casinos;
    e. Concert venues;
    f. Theaters;
    g. Sporting event venues and golf courses;
    h. Retail facilities, including shopping malls, except for pharmacy or other health care facilities within retail operations; and
    i. Other businesses (such as legal services, business and management consulting, professional services, and insurance services) are encouraged to have employees work remotely.

The Order issued by the City of Philadelphia:

1. Extends through March 27
2. Requires all non-essential commercial activity and all non-essential government operations ordered to stop.
3. Contains a list of "essential" businesses permitted to remain open include:
    a. Supermarkets and grocery stores;
    b. Big box stores;
    c. Pharmacies;
    d. Discount stores, mini-markets, and non-specialized food stores;
    e. Daycare centers;
    f. Hardware stores;
    g. Gas stations;
    h. Banks;
    i. Post offices;
    j. Laundromats and dry cleaners;
    k. Veterinary clinics for domestic pets and pet stores; and

l. Other "essential" businesses including commercial establishments that sell any of the following:
   i. Frozen products;
   ii. Non-specialized stores of computers, telecommunications equipment, audio and video consumer electronics, household appliances;
   iii. IT and telecommunication equipment;
   iv. Hardware, paint, flat glass;
   v. Electrical, plumbing and heating material;
   vi. Automotive fuel;
   vii. Domestic fuel;
   viii. Sanitary equipment;
   ix. Personal hygiene products and medication not requiring medical prescription;
   x. Medical and orthopedic equipment;
   xi. Optics and photography equipment; and
   xii. Soaps and detergents.

4. Consistent with the statewide restrictions, food establishments in Philadelphia may only accommodate online and phone orders for delivery and pick-up (no dine-in service). All such orders must be placed in advance. Any form of in-person ordering, even from a "takeout counter," is prohibited.

While the Governor has encouraged all employees to work from home as much as possible, there are no restrictions expressly preventing, for example, business owners from visiting their offices or maintaining on-site security officers. Businesses engaged in construction or other trades can continue.

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