Legislative & Regulatory Developments in a Time of Change

Agenda

1. The state of the State
   - Minnesota legislative developments
   - Governor’s stay-at-home order

2. The federal response
   - Families First Coronavirus Response Act (“FFCRA”)
   - Coronavirus Aid, Relief and Economic Security Act (“CARES”)

3. Future litigation risks

4. 2021 Minnesota legislative session – a (potential) preview

5. Prognostication!
Stay updated about COVID-19 – Rapid Changes
Continue!

Coronavirus Resource Center

www.Dorsey.com/Coronavirus

The 2020 MN Legislative Session – Pre-COVID-19

• Business as usual
• Non-budget year
• Bonding
• Setting the stage for November election
• Employer mandate legislation
The 2020 MN Legislative Session – Post-COVID-19

- Legislature still working
- Passed 4 COVID-19 bills
- Philosophical differences increasing
- Pressure to “Get Minnesota Back to Work”
- Increased pressure on State financial resources
- May budget projection – clarifying moment
- Bonding – economic stimulus
- Likely special session or sessions

The Minnesota Stay-at-Home Order

- Executive Order 20-33
  - Ends on May 3 at 11:59 p.m. unless extended
  - Provides “essential worker” guidance
    - Process to gain clarity as to who qualifies has changed – multiple paths
    - Need for “hall pass” for essential employees?

- Operational issues
  - Responding to inquiries from law enforcement regarding ongoing business operations
  - Communicating with your workforce
Two New and Important Statutes

• Families First Coronavirus Response Act (“FFCRA”)
  – Enacted March 18, 2020
  – Effective April 1, 2020
  – Creates two new types of paid-leave benefits:
    • Emergency Paid Sick Leave Act (“EPSLA”)
    • Emergency Family and Medical Leave Expansion Act (“EFMlea”)

• Coronavirus Aid, Relief, and Economic Security (“CARES”) Act
  – Enacted March 27, 2020
  – Covers broad range of topics including federal PPP loans, pandemic unemployment
    insurance, and limited amendments to FFCRA

VERY Brief Overview of Paid-Leave Requirements in FFCRA

• BOTH paid sick leave and EFMlea...
  – Apply only to smaller employers (1-499 employees)
  – Require employer to provide paid leave
  – Employer eligible for up to 100% reimbursement via payroll tax credits
  – Paid leave only available if employee cannot work or telework due to a need for leave
    for a qualified reason.
Emergency Paid Sick Leave

- Applies to all employees, immediately (no waiting period)
- Up to two weeks (80 hours) of paid sick leave
- Employee cannot work (or telework) due to a need for leave for six possible reasons:
  - subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  - advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
  - experiencing symptoms of COVID-19 and seeking medical diagnosis
  - Caring for an individual who is subject to a quarantine or isolation order, or who was advised by health care provider to self-quarantine due to COVID-19-related concerns;
  - Caring for son or daughter due to school or child care closures or unavailability; or
  - Experiencing a “substantially similar condition” as specified by the Secretary of Health and Human Services
    • Unclear what this means
- Cap for first three reasons: 100% of regular rate of pay, capped at $511/day ($5,110 aggregate)
- Cap for last three reasons: 100% of regular rate of pay, capped at $200/day ($2,000 aggregate)

Emergency FMLA Expansion (EFMLEA)

- Employee must be employed for 30 calendar days
  - Bill pending in U.S. House of Representatives could eliminate this requirement (HR 6379), but has stalled
- Adds one new reason for FMLA leave: Caring for son/daughter whose school / care is closed, or child care provider unavailable, due to COVID-19 related reasons
- Two weeks of unpaid family leave; ten weeks paid (12 total)
  - Can use two weeks of emergency paid sick leave (or other accrued paid leave) in place of unpaid leave
- 2/3s of an employee’s regular rate of pay, capped at $200 per day ($10,000 aggregate)
Potential Landmines for Employers

1. Miscounting “employees”
   The FFCRA only applies to employers with fewer than 500 employees...but what are “employees”?
   • Guidance on counting from the DOL:
     – **COUNT:** Employees in the United States, full-time and part-time employees, employees on leave, temporary employees (even those jointly employed by another employer), and day laborers
     – **DO NOT COUNT:** Employees outside of the United States, independent contractors, employees who have been furloughed or laid off
     – Practical Tip: More important than ever to correctly categorize employees and independent contractors
   • Even more complicated for employers with complex management structures
     – Distinct business entities may be counted as a single employer depending on the circumstances.
     – Employees of distinct entities may be counted together if the distinct entities share common management, interrelation between operations, centralized control of labor relations, or some common ownership or financial control, or if the different entities share control over employees (i.e., hiring and firing authority, day to day supervision, and control over the terms of employment).
       • E.g., parent-subsidiary companies, affiliated companies, or companies that share or lease employees,
     – Fact-specific application of multiple tests; consult counsel.

Potential Landmines for Employers

2. The “fewer than 500 employees” test is not static

   Consider...
   – Employer with more than 500 employees who conducts layoffs or furloughs; or
   – Employer with fewer than 500 employees who hires.

   – **Number of employees counted as of time employee requested leave**
     • Can be different result for two employees requesting same leave at different times
     • If today you have 499 employees, required to provide paid leave benefits
     • If next week you hire, and have 500+ employees, no longer required to provide paid leave benefits and may be ineligible for payroll tax credits if you mistakenly provide benefits.
3. I’m an employer with fewer than 50 employees. I’m exempt, right?

– There is an exemption in the FFCRA for employers with fewer than 50 employees…

– **BUT IT APPLIES ONLY TO PAID-LEAVE BENEFITS UNDER EFMLEA AND § 5102(a)(5) of the EPSLA**

  – Only applicable to paid-leave benefits for an employee to care for son or daughter due to school or child care closure or unavailability

  – No exemption for any other qualified reason for leave

4. Can I require documentation from my employees?

   **YES!**

   **Documentation for EPSLA Leave**
   - Employee name
   - Date(s) of leave
   - Qualifying reason for leave
   - Statement that employee cannot work or telework due to qualifying reasons

   **Documentation for EFMLEA Leave**
   - Employee name
   - Name of child cared for
   - Name of school/place of care/child care provider
   - Statement that no other suitable person is available to care for the child

   **Potential Landmine:**
   - Be wary of federal and state medical privacy laws
Potential Landmines for Employers

5. Need to set clear expectations for employees who are teleworking for the first time
   - “Unable to work or telework” is highly case specific
   - Need to clearly document issues with employees’ teleworking performance
   - Consider formal Work From Home policy that requires employees to perform in substantially the same manner as if performing work at a worksite
   - Remember wage & hour policies!

6. Leave calculation issues
   - Pre-FFCRA leave paid leave doesn’t count!
   - Use of intermittent leave?
   - Beware non-FFCRA paid leave
A note on unemployment . . .

- Potential issues:
  - Temporary unemployment
  - Partial unemployment
  - Impact of other payments
  - CARES Act benefits > actual wages

- Don’t advise employees regarding UI eligibility.
- Beware of UI fraud!

Employment Litigation Risks In a Post-COVID World

- Paid leave claims
  - Failure to provide benefits – FLSA remedies
  - Failure to notify employees of benefits
  - Independent contractor/employee
  - Miscalculation of paid leave entitlements

- Disability claims (ADA)
  - Failure to accommodate

- Compensation claims
  - Wage theft
  - Failure to provide wage change notice
  - Beware of contracts with guaranteed salaries
  - “Off the clock” claims for teleworking employees
Employment Litigation Risks In a Post-COVID World

• Termination claims
  – WARN Act
  – Wrongful termination, retaliation, and whistleblower claims
  – Disparate impact claims – furloughs & termination selection

• Other
  – Bias or HWE claims by Asian-American employees
  – Occupational exposure?
  – Gross negligence/wrongful death?

Minnesota Legislative Agenda 2021 – Back to Normal?

Sexual Harassment/Severe or Pervasive (HF 3507)

• Multi-year effort to modify the “definition of “sexual harassment” in the Minnesota Human Rights Act

• Attack on “severe or pervasive” standard as too high a bar

• Follows other states that have taken the same path

• Minnesota Supreme Court heard argument in November 2019 in case challenging the standard; should rule soon
Minnesota Legislative Agenda 2021 – Back to Normal?

• Paid Family and Medical Leave (HF 5)
• Paid Sick and Safe Leave (HF 11/SF 1597)
• Prohibition on Non-Compete Agreements (HF 3673)
• Prohibition on Inquiring About Applicant Pay History (HF 4100/SF 4192)

Minnesota Legislative Agenda 2021 – Back to Normal?

• Restrictions on Use of Credit History in Staffing Decisions (HF 3601/SF 4218)
• Employment Survey Mandate (HF 3404/SF 4036)
• Pregnancy Leave (HF 3073/SF 4330)
• Employee Classification and Independent Contractors (HF 4009/SF 4018)
Prognostication!

- What’s next for employers in Minnesota and beyond?