Leaves and Accommodations in the Age of COVID-19

Objectives of this Session

1. Provide answers to COVID-19 leave-related questions you are likely to encounter, through several hypotheticals.
2. Discuss the application of and interplay between the new COVID-19 laws and existing leave and disability laws.
4. Have fun!
5. Keep you awake!
Introduction and Overview

Leaves and Accommodations: Which Laws Do I need to Know About?

- Families First Coronavirus Response Act (FFCRA)
  - Paid Sick Leave
  - Paid FMLA Leave
- Family Medical Leave Act (FMLA)
- Americans with Disabilities Act (ADA)
- Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

Hypothetical #1

Eugene is not working because he doesn’t have child care due to school closure. Your company is placing some, but not all, employees on furlough. Eugene asks to be placed on furlough so he can get unemployment benefits while he is home taking care of his child. What do you do?
Hypothetical #1 Answer

• FFCRA covered or not?
  – Fewer than 500 employees?

• Eligible for FFCRA leave?
  – Length of Eugene’s employment?
    • Paid Sick – eligible right away
    • Paid FMLA – must have “been employed for at least 30 calendar days”

• Unemployment considerations?
  – Make the furlough decision independent of Eugene’s child-care needs
  – Employers and employees may not reach agreements designed to obtain unemployment benefits
  – Eugene could resign and state unemployment agency will determine whether he should receive benefits

Hypothetical #2

The MN Governor has issued a Stay-At-Home Order, which requires non-Critical Sector workers to either work remotely from home or to not work at all if they cannot perform their duties from home. Luckily, your small business (roughly 450 employees) is in the Critical Sector. However, several of your employees whose jobs cannot be performed remotely come to you asking to use paid sick leave under the FFCRA, citing the Governor’s Order as the basis for their request. Does the Governor’s Order qualify those employees for paid sick leave under the FFCRA?
Hypothetical #2 Answer

• Governor Walz’s Executive Stay-At-Home Order:

  6. Exemptions – Critical Sectors. All workers who can work from home must do so. *Workers in the following Critical Sectors*, who are performing work that cannot be done at their home or residence through telework or virtual work and can be done only at a place of work outside of their home or residence, are exempted from the prohibition in paragraph 1 as set forth below.

  TAKEAWAY: The Order does NOT require workers in Critical Sectors to stay at home rather than go to work.

• FFCRA Paid Sick Leave:

  Employee is unable to work or telework due to a need for leave because: (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

  TAKEAWAY: The FFCRA does NOT apply to MN Critical Sector workers because Governor Walz’s Order permits them to go to work.

Hypothetical #3

Mary has been on an unpaid FMLA medical leave of absence for the last several weeks. She calls you this week to let you know she suspects she has COVID-19, and would like to switch over to PAID sick leave for two weeks, then resume her unpaid FMLA leave. How should you respond?
Hypothetical #3 Answer

• **FFCRA Paid Sick Leave:**
  – Employee is unable to work or telework due to a need for leave *because*: (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

• **DOL Guidance:**
  – The DOL has not provided specific guidance on this question. However, if your employee is already out on FMLA leave because she cannot work due to a medical condition, it is likely that the underlying medical condition, not COVID-19, is preventing her from working.
  – This corresponds to the DOL’s guidance regarding workers’ comp and disability benefits: “If you receive workers’ compensation or temporary disability benefits because you are unable to work, you may not take paid sick leave or expanded family and medical leave. However, if you were able to return to light duty and a qualifying reason prevents you from working, you may take paid sick leave or expanded family and medical leave, as the situation warrants.”

Hypothetical #4

Following the Governor’s shelter-in-place order, ABC Corp. employee Roya’s father had a stroke, and she will be assisting him both because of the stroke and because his health-care provider advised him to self-quarantine due to his fragile condition. Roya is staying with her father and working from his home, and she has requested intermittent leave to assist her father throughout the workday. Roya is a project manager, however, and it is important for her to be available to conduct regular virtual team meetings to keep her team on task while working remotely. Must ABC Corp. grant her request for intermittent leave?
Hypothetical #4 Answer

- **FFCRA Paid Sick Leave:**
  - Employee is unable to work or telework due to a need for leave because the employee is caring for an individual who has been advised by a health care provider to self-quarantine related to COVID-19
- **Unpaid FMLA Leave:**
  - Employee is caring for the employee’s spouse, or a son, daughter, or parent who has a serious health condition
- **Eligible for intermittent leave?**
  - FFCRA - Yes, if employee and employer agree
  - FMLA – Employer consent is not required for intermittent leave to care for family member
- **TAKEAWAY:** Be sure to provide appropriate documentation for, and consider rules applicable to, all leave options available to employees!

Hypothetical #4, Continued

One week after Roya requested leave, ABC Corp. determined that it must furlough 20% of its workforce due to a decrease in business. Roya is selected to be included in the furlough, and she has contacted HR to say she doesn’t think it’s legal to cut off her paid leave benefits. What should HR tell her?
Hypothetical #4 Answer, Part 2

• **Furlough of Employee on FMLA Leave:**
  – Permissible if employee would have been selected regardless of leave request
  – The FMLA doesn't provide employees on leave with any greater right to their jobs than other employees when making selections for furloughs or reductions in force, but employers cannot select employees because of their protected leave

• **Furlough of Employee Receiving FFCRA Benefits:**
  – DOL Guidance: “If your employer reduces your work hours because it does not have work for you to perform, you may not use paid sick leave or expanded family and medical leave for the hours that you are no longer scheduled to work”

• **TAKEAWAY:** Carefully document objective criteria used to select employees for furloughs / RIFs to avoid discrimination/disparate treatment claims!

---

Hypothetical #4, Continued

When shelter-in-place ends, ABC Corp. sends notice to Roya that her furlough also has ended and that she should report to work in the office the following Monday. Roya responds that she is still caring for her father, and since she was able to work remotely and care for him during the shelter-in-place order, she would like to continue doing so going forward. Must ABC Corp. Grant this request?
Hypothetical #4 Answer, Part 3

• FMLA:
  – Does not require accommodations, such as granting employees the ability to work remotely
  – Thus, the employer does not need to grant the employee an ongoing right to continue working remotely to care for a family member after a shelter-in-place order is lifted
  – The employer would, however, need to continue complying with any intermittent leave granted to the employee under the FMLA

• ADA:
  – BE AWARE, however, that if an employee asks to continue working from home due to the employee’s own physical or mental health condition, the employer should engage in an interactive process to determine whether this request constitutes a reasonable accommodation under the ADA

• TAKEAWAY: Employers should be prepared to respond to employee requests to continue working remotely after shelter-in-place orders end!

Hypothetical #5

As with Roya, ABC Corp. sends notice to Darryl that his furlough has ended and that he should report to work in the office the following Monday.

Darryl responds that he will not come to work because he read a coworkers Facebook posts about having been diagnosed with (and having recovered from) COVID-19. Darryl states that he does not want to be exposed to the coronavirus and requests to remain on leave.

How should ABC Corp. respond?
Hypothetical #5 Answer

• **OSHA:**
  - Employees may refuse to perform a task if all of the following conditions are met:
    • Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so; **and**
    • You refused to work in "good faith." This means that you must genuinely believe that an imminent danger exists; **and**
    • A reasonable person would agree that there is a real danger of death or serious injury; **and**
    • There isn’t enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

• **TAKEAWAY:**
  - Listen to the concerns.
  - Apply existing policies.