Federal Law Alerts - April 2020

OSHA Recordkeeping Requirements and COVID-19

On April 10, 2020, the Occupational Safety and Health Administration (OSHA) issued interim guidance for enforcing its recordkeeping requirements in recording COVID-19 cases. COVID-19 is a recordable illness, and employers are responsible for recording cases of the disease if the case:

- Is confirmed as a COVID-19 illness;
- Is work-related; and
- Involves one or more of the general recording criteria, such as medical treatment beyond first aid or days away from work.

In areas where there is ongoing community transmission, employers other than those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work. Accordingly, until further notice, OSHA will not enforce its recordkeeping requirements to require these employers to make work-relatedness determinations for COVID-19 cases, except where:

- There is objective evidence that a COVID-19 case may be work-related; and
- The evidence was reasonably available to the employer. Employers of workers in the healthcare industry, emergency response organizations, and correctional institutions must continue to make work-relatedness determinations.

OSHA's enforcement policy will provide certainty to the regulated community and help employers focus their response efforts on implementing good hygiene practices in their workplaces and otherwise mitigating COVID-19's effects.

Read the interim guidance and more on OSHA's COVID-19 webpage

EEOC Issues Updated Covid-19 Technical Assistance Publication

On April 9, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) posted an updated and expanded technical assistance publication addressing questions under the federal equal employment opportunity laws related to the COVID-19 pandemic. The publication, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, expands on a previous publication that focused on the ADA and Rehabilitation Act, and adds responses to common inquiries in the following topics:

- Disability related inquiries and medical exams;
- Confidentiality of medical information;
- Hiring and onboarding;
- Reasonable accommodation; and
- Furloughs and layoffs.

The EEOC also provides additional resources related to the pandemic in an employment context.

OSHA Reminder that Retaliation for Reporting Unsafe Conditions Prohibited

On April 8, 2020, the Occupational Safety and Health Administration (OSHA) released a reminder to employers that it is illegal to retaliate against workers when they report unsafe and unhealthful working conditions, including during the coronavirus pandemic. Retaliation may include termination, demotion, denial of overtime or promotion, or reduction in pay or hours.

Under the Occupational Safety and Health Act (OSH Act), employees have the right to safe and healthy workplaces, and any worker who believes that their employer is retaliating against them for reporting unsafe working conditions is instructed to immediately contact OSHA.

Workers may contact OSHA or may file an online whistleblower complaint if they believe their employer has retaliated against them for exercising their rights under the whistleblower protection laws. The OSHA Whistleblower Protection Program webpage provides resources about worker rights, and includes fact sheets on whistleblower protections for employees in various industries along with frequently asked questions.

Read more about OSHA whistleblower protections

DOL Guidance on Federal Pandemic Unemployment Compensation

On April 4, 2020, the U.S. Department of Labor announced publication of its Unemployment Insurance Guidance Letter 15-20 (UIPL 15-20) providing guidance to states for Federal Pandemic Unemployment Compensation (FPUC). Under FPUC, states will administer an additional $600 weekly payment to certain eligible individuals who are receiving other benefits. This provision is contained in § 2104 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) enacted on March 27, 2020.

The program allows states to provide an additional $600 per week benefit to individuals who are collecting regular unemployment compensation, including Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX), as well as the following unemployment compensation programs:

- Pandemic Emergency Unemployment Compensation (PEUC);
- Pandemic Unemployment Assistance (PUA);
- Extended Benefits (EB);
- Short-Time Compensation (STC);
- Trade Readjustment Allowances (TRA);
- Disaster Unemployment Assistance (DUA); and
- Payments under the Self-Employment Assistance (SEA) program.

FPUC benefit payments are fully federally funded.

The benefit payments under FPUC may begin as soon as the week after the execution of a signed agreement between the Department of Labor and states. The timeline for these payments will vary by state. As states begin providing this payment, eligible individuals will receive retroactive payments back to their date of eligibility or the signing of the state agreement, whichever came later. All states have executed agreements with the department as of March 28, 2020. The CARES Act specifies that FPUC benefit payments will end after payments for the last week of unemployment before July 31, 2020.

The guidance letter also includes guidance about protecting unemployment insurance program integrity, as the provisions in the CARES Act operate in tandem with the fundamental eligibility requirements of the federal-state UI program. The department is working with states receiving funding under the act to provide unemployment insurance benefits to those who are entitled to them.

Read the announcement

Temporary Rule: Paid Leave under the Families First Coronavirus Response Act

On April 1, 2020, the U.S. Department of Labor announced new action regarding the protections and relief offered by the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act, both part of the Families First Coronavirus Response Act (FFCRA). The FFCRA reimburses private employers with fewer than 500 employees with tax credits for the cost of providing employees with paid leave taken for specified reasons related to COVID-19.

The Department's Wage and Hour Division (WHD) posted a temporary rule issuing regulations pursuant to this new law, effective April 1, 2020. The regulations 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 the COVID-19 global pandemic. The leave provisions are created by a time-limited statutory authority established under the FFCRA and are set to expire on December 31, 2020. The temporary rule is effective from April 1, 2020 through December 31, 2020.

In this temporary rule, the department:

- Issues rules relevant to the administration of the FFCRA's paid leave requirements.
- Provides direction for administration of the Emergency Paid Sick Leave Act (EPSLA), which requires that certain employers provide up to 80 hours of paid sick leave to employees who need to take leave from work for certain specified reasons related to COVID-19. These reasons may include the following:
    - The employee or someone the employee is caring for is subject to a government quarantine order or has been advised by a health care provider to self-quarantine;
    - The employee is experiencing COVID-19 symptoms and is seeking medical attention; or,
    - The employee is caring for their son or daughter whose school or place of care is closed or whose childcare provider is unavailable for reasons related to COVID-19.
- Provides direction for administration of the Emergency Family and Medical Leave Expansion Act (EFMLEA), which requires that certain employers provide up to 10 weeks of paid, and two weeks unpaid, emergency family and medical leave to eligible employees if the employee is caring for their son or daughter whose school or place of care is closed or whose childcare provider is unavailable for reasons related to COVID-19.

Read more here and here

COVID-19 and Employee Retention Credit

On March 31, 2020, the U.S. Treasury Department and the Internal Revenue Service launched the Employee Retention Credit. The refundable tax credit is 50 percent of up to $10,000 in wages paid by an eligible employer whose business has been financially impacted by COVID-19. The credit is available to all employers regardless of size, including tax-exempt organizations, with the following two exceptions:

- State and local governments and their instrumentalities; and
- Small businesses who take small business loans.

Qualifying employers must fall into one of the following categories, which are calculated each calendar quarter:

- The employer's business is fully or partially suspended by government order due to COVID-19 during the calendar quarter.
- The employer's gross receipts are below 50 percent of the comparable quarter in 2019. Once the employer's gross receipts go above 80 percent of a comparable quarter in 2019, they no longer qualify after the end of that quarter.

In calculating the credit, the amount of the credit is 50 percent of qualifying wages paid up to $10,000 in total. Wages paid after March 12, 2020, and before January 1, 2021, are eligible for the credit. Wages considered for the credit are

not limited to cash payments, but also include a portion of the cost of employer provided health care.

Qualifying wages are based on the average number of a business's employees in 2019 as follows:

- If the employer had 100 or fewer employees on average in 2019, the credit is based on wages paid to all employees, regardless if they worked or not. If the employees worked full-time and were paid for full-time work, then the employer still receives the credit.
- If the employer had more than 100 employees on average in 2019, then the credit is allowed only for wages paid to employees who did not work during the calendar quarter.

Employers may be immediately reimbursed for the credit by reducing their required deposits of payroll taxes that have been withheld from their employees' wages by the amount of the credit. Eligible employers will report their total qualified wages and the related health insurance costs for each quarter on their quarterly employment tax returns, or Form 941, beginning with the second quarter. If the employer's employment tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by submitting Form 7200, *Advance Payment of Employer Credits Due to COVID-19*. Form 7200 may also be used by eligible employers to request an advance of the Employee Retention Credit.

Read more here