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COVID-19 Employment Issues

- FLSA
- FFCRA, CCA, ARPA
- Paid Sick Leave / E-FMLA
- Deferred Compensation
- COBRA
- Flexible Spending Accounts
- Managing Employees
- Sick Employees
- OSHA
- NLRA
- Discrimination
- FAQs
- CARES Act; PPP Loan; Furlough; Unemployment Issues; Workers Compensation; etc.
Fair Labor Standards Act (FLSA)

- Are exempt employees still exempt, or have roles changed due to remote work?
- How are you tracking time worked?
- Have you communicated when employees should and should not be working?

Managing Employees During COVID-19

- Establish clear communication plan (both down & up the ladder)
- Schedule regular equipment/workspace/capability check-ins
- Revisit job descriptions, if needed
- Set productivity expectations – reiterate & clarify as necessary
- Be careful what you ask
FFCRA vs. ARPA

- Mandatory* v. permissive
  - Families First Coronavirus Response Act expired 12/31/20;
  - Consolidated Appropriations Act expired 3/31/21; and
- Under ARPA, discrimination in favor of HCEs, FT employees, or on basis of employment tenure is prohibited (result = no payroll tax credits).
  *There were certain exceptions, but PSL and E-FMLA were generally mandatory under FFCRA.

Paid Sick Leave - FFCRA

- Required under the FFCRA – now expired:
  - 2 weeks (80 hours max)
  - Every employer < 500 employees
  - Every employee
  - Addition to existing PTO
  - Immediate use
  *Voluntary continuation under the CCA (now expired) and ARPA.
FFCRA MANDATORY Paid Sick Leave

Employee requests sick leave

- Employee ordered to isolate?
- Employee directed to quarantine?
- Employee w/ symptoms seeks DX?

Yes

- Employee entitled to 2 weeks paid leave
  - Average weekly wage
  - Max $511/day
  - Max $5,110/total

No

- Employee does not qualify for FFCRA paid sick leave

Yes

- Employee entitled to 2 weeks paid leave
  - 2/3 average weekly wage
  - Max $200/day
  - Max $2,000/total

Paid Sick Leave - ARPA

- Voluntary continuation under the ARPA:
  - 2 weeks (80 hours max) *can be new!
  - Every employer < 500 employees
  - Every employee
  - Addition to existing PTO
  - Immediate use
  - Extended reasons

ARPA VOLUNTARY Paid Sick Leave

Employee requests sick leave

- Employee ordered to isolate, directed to quarantine, or employee w/ symptoms seeks DX? **PLUS**
- Employee exposed to or whose employer requests test/DX is seeking or awaiting results of test of DX,
employee obtaining immunization or recovering from injury, disability, illness or condition related to immunization

Yes

- Employee entitled to 2 weeks paid leave
  - Average weekly wage
  - Max $511/day
  - Max $5,110/total

No

- Employee does not qualify for FFCRA paid sick leave

Yes

- Employee entitled to 2 weeks paid leave
  - 2/3 average weekly wage
  - Max $200/day
  - Max $2,000/total
E-FMLA

FCCRA:
Only applies to closed school or childcare.
Up to 12 weeks.
The first 2 unpaid. Then next 10 paid at 2/3. $10k cap.

ARPA:
Same reasons as Paid Sick Leave.
Up to 12 weeks.
The first 2 paid up to $200/day.
Then next 10 paid at 2/3. $12k cap.

Takeaways

Start

Wage and Hour Issues
Leave Issues

Safety Issues

Questions

End

Vaccination and Return to Work Issues

Deferred Compensation Considerations

• Did you delay payment of bonus/deferred compensation or pay less than was promised?
  • IRC 457(f)
  • Breach of contract
• Did you allow withdrawals from NQDC plans for an "unforeseeable emergency"?
  • Higher bar than 401(k) plan
COBRA Considerations

• Certain deadlines were tolled during the “outbreak period” – IRS/DOL clarified earlier of one year from individual deadline or 60 days after announced end of COVID-19 national emergency
  • COBRA, but also claims
• 100% COBRA subsidy 4/1/21 – 9/30/21 for individuals who lost group health insurance due to an involuntary termination or reduction in hours
  • Refundable FICA tax credit to employer
• Covers all qualified beneficiaries within last 18 months (new 60-day election period/notice – did not elect or dropped)

Flexible Spending Account Considerations

• The Consolidated Appropriations Act provides temporary relief for health and dependent care FSAs:
  • 100% of unused balances at end of 2020 and 2021 plan years may be carried over under both types of FSAs;
  • Grace periods for plan years ending in 2020 and 2021 may be extended 12 months (rather than 2 ½);
  • Certain prospective mid-year elections are permitted; and
  • Reimbursement of health expenses post-termination of employment is permitted through the end of the 2020 or 2021 plan year, as applicable.
• ARPA raises the maximum dependent care FSA contribution to $10,500 ($5,250 for married, filing separately) for 2021.

Takeaways
Safety Issues

- Vaccinations
- Masks
- Social Distancing
- OSHA
- NLRB

Step 1 = Planning

- You are not Walmart/Amazon/Target/Bank of America or Mission Hospital
- Do not just do what others are doing
- Involve employees in planning
- Avoid “blanket rules”

Step 2 = Clearly State the Policy

- Policies are not Hallmark cards
- If you can’t clearly state your policy – then you need to start over – vague policies are not policies
- Policies are not secrets - post it conspicuously – paper and electronic
Step 3 = Training

- Policies are not absorbed by osmosis
- Training is not a negotiation
- Negotiations and compromises are part of the planning process

Step 4 = Supervision and Enforcement

- Supervisors who don’t supervise and enforce ... shouldn’t be supervisors
- Your supervisors are YOU - their actions write checks that YOU must cash

Occupational Safety and Health Administration

Provide a safe working environment for employees?
Regulations – Blessing or Curse

• Too much regulation
• Not enough regulation

OSHA and Masks

• OSHA = protect the wearer
  • Duty to supply and fit test
• CDC = protect those around the wearer
  • BYOM is allowed but use common sense

CDC and Social Distancing

• Recommendations vary based on extent workforce is vaccinated
• Recommendations will change
• Can treat vaccinated and unvaccinated differently with respect to virus control measures
National Labor Relations Act

• Cannot take adverse action for engaging in protected concerted activity
  • Refusing to work based upon a “good faith” belief that the work environment is unsafe

Sick Employees

• Can tell employees if a coworker diagnosed – w/o specifics
• Can ask an employee if sick - symptoms (fever, cough, tiredness, and shortness of breath) must maintain confidential
• Can take employee temp (but not all temps mean COVID-19)
• Can send sick employee home if symptoms
• Can require fitness to RTW
• Can withdraw job offer if diagnosed

Takeaways
Vaccination and RTW Issues

• Mandatory vaccination policies
• North Carolina is not like every other state
• You have options and flexibility
• This area is in flux – watch for changes

 Discrimination Considerations

Disability and religious accommodations
Unfairness and favoritism can be in the eye of the beholder

 Religious Accommodation

Reasonably accommodate employee’s religious beliefs or practices
• Unless undue difficulty / expense
• Allowing voluntary shift swaps to attend religious services
FAQ #1

• If you think a coworker has COVID-19, who do you tell and are you protected (whistleblower)?

Suggest employee self-report - tell supervisor – go up chain
Might still be allowed to work if asymptomatic
Retaliation is prohibited – whistleblower is a specific status but public policy would be an issue
FAQ #2

• Can employees still work remotely – and do you have to let them?
• Can they – sure if you agree to allow
• Do you have to allow – only if it’s an accommodation and the request is not unreasonable or unduly burdensome

FAQ #3

• Can you require employees to be vaccinated?
• In NC and in general, yes. Accommodations may be necessary for disability and religious issues

FAQ #4

• Can you incentivize employees to be vaccinated?
• Absolutely – very smart approach
FAQ #5

• Can you require proof of vaccinations?
  • Yes – if you require vaccinations

FAQ #6

• What do you do with the health information you receive?
  • You must protect it and treat it the way you would treat other employee health information

Q&A

• If we end up with a CV19 W/C claim – or a take home case – can that trigger a worker’s comp claim?
  • Yes. Absent gross (intentional) negligence, the employee’s sole remedy is W/C. But a take home case is not limited to W/C – but causation would be an issue.
Other Questions?

HELP!

Takeaways

Wage and Hour Issues
Leave Issues
Safety Issues
Vaccination and Return to Work Issues
Questions
Start
End

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