COVID-19 – the Latest Local, State and Federal Mandates Impacting the Workplace

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Information provided in this slide deck is up-to-date as of March 18, 2020 and does not constitute medical advice.
Initial Thoughts...

- As the new coronavirus (COVID-19) spreads in the United States, employers are taking a variety of precautions to protect their workplaces while still trying to conduct business.

- There is NO UNIFORM path forward. Different industry, geographic area, and workforce needs vary greatly. Also, the situation is fluid and changes by the hour. DO NOT think there’s a precise “right way” of handling this situation for your workplace.

- Your business may be limited by local, state and federal mandates already in place or that could be in place in the days and weeks to come. We must be flexible and creative in these times.

- The purpose of this discussion is to educate you regarding COVID-19 and to provide you with an understanding of your rights and responsibilities as an employer.

- The 2 most important things to keep in mind from a business perspective: 1) the health, welfare and safety of everyone (employees, contractors, customers, suppliers, the public, etc...) and 2) the ability to operate your business as effectively as possible.
The latest to discuss/review...

- H.R.6201 – summary and status
- Mandated Business Closures (i.e. bars & restaurants)
- Non-Essential Business Closures
- School Closings – impact on available workforce
- Unemployment Developments
- Paid Sick Leave Mandates
- Remote Work Options/Issues
- Furloughs vs. Layoffs – refresher
- WARN Considerations
On March 14, 2020, the U.S. House of Representatives passed House Bill 6201 (H.R.6201). The legislation seeks to protect private sector workers and government employees during the COVID-19 pandemic. However, the legislation does not apply to any private sector employer with 500 or more employees. To be clear, the current legislation will regulate only those private sector employers who employ less than 500 employees. The Senate now has the bill. The legislation would take effect within 15 days of enactment and expire on December 31, 2020.
1) H.R.6201 contains major changes to the FMLA as it seeks to provide job protected paid leave to any employee who has been on the job for at least 30 days – for up to 12 weeks – related to the COVID-19 pandemic. (**this has already been “tweaked” as of March 16th**)

2) The legislation also mandates up to 80-hours of paid sick leave for reasons related to COVID-19.

3) It also provides $1 billion in additional funding to the Unemployment Insurance (UI) System and encourages states to relax UI eligibility requirements. Tax credits are provided to employers to help offset the financial cost of the paid leave.
H.R.6201

PAID TIME OFF COMPONENT:

- Emergency Paid Sick Leave Law – *up to 80-hours* for ALL employees working for a private employer with less than 500 employees or any public sector employer.
- H.R.6201 requires *employers with fewer than 500* employees and all government employers to provide all employees *up to 80-hours of paid sick leave*, paid at the employee’s regular rate of pay if the employee is unable to work (or telework) due to:
  - being ordered or advised to self-quarantine related to COVID-19; or
Additionally, this paid sick leave entitlement must also be available – at two-thirds (2/3rds) the employee’s regular rate of pay – for employees who are unable to work (or telework) due to need to care for an individual who is ordered or advised to self-quarantine or care for a child (under 18 years of age) whose school or place of care has closed or paid child care provider is unavailable due to COVID-19.
H.R.6201

- Full-time employees are entitled to 2 weeks (80 hours) of paid leave and Part-time employees are entitled to the average number of hours that they work in a typical two-week period.
- Paid sick leave under H.R.6201 must be provided in addition to any paid time off provided under an employer’s existing policies or other local/state mandates and employers may not require employees to exhaust existing accrued paid time off prior to using emergency paid sick leave.
- The bill ensures employees who work under a multiemployer collective agreement are also provided such benefits that meet the requirements of the Act.
H.R.6201: EXPANDED COVERAGE FOR FMLA

- **Paid Family and Medical Leave** — up to 12 weeks for employees employed for 30 or more days by a private employer with less than 500 employees or any public sector employer

- Applies to employees of employers with fewer than 500 employees or government employers, who have been on the job for at least 30 calendar days

- Employee has right to take up to 12 weeks of job-protected leave to care for the employee’s child (under 18 years of age) if the child’s school or place of care has been closed, or the child-care provider is unavailable, due to COVID-19.
While the first 2-weeks of time off for the above reasons are unpaid under the FMLA, the Emergency Paid Sick Leave Law (discussed above) requires that an employee is paid during that time period, as described above.

After the first 2-weeks of leave under the FMLA, employees will be entitled to receive a benefit from their employers that will be no less than two-thirds (2/3rd) of the employee’s usual pay.

The bill ensures employees who work under a multiemployer collective agreement and whose employers pay into a multiemployer plan are provided with leave.
March 16, 2020 – “tweaks”…

- The March 14th version would have required employers to provide workers with partially paid Family and Medical Leave Act leave for quarantine, to care for a family member, or to care for a child. The March 16th version would only include a “qualifying need” for FMLA leave to only those instances where an employee can’t work or telework because his or her child’s school, day care, or child care is closed or unavailable. ***We continue to await final changes in the Senate.***

***Of course, the current FMLA law requires covered employers to allow eligible employees to take job protected time away for their own serious health condition or to care for a family member’s serious health condition.
**H.R.6201 Exceptions?**

- *Certain small employers (less than 50 employees) can be exempt from this expanded FMLA coverage if they meet a “viability” exception.* While we can assume the general intent behind the exception, the precise mechanism and process for such a SMALL BUSINESS exception is subject to US DOL regulation yet to be published.

- The US DOL can also exempt health care workers and emergency responders.
H.R.6201 Tax Credits?

PAYROLL CREDIT FOR PAID LEAVE

- HR6201 provides a refundable tax credit applied to the employer portion of the Social Security payroll tax equal to 100 percent of paid sick leave and family leave wages paid by an employer for each calendar quarter, subject to the following caps: Sick leave wages paid with respect to employees who must self-quarantine, obtain a diagnosis or care for symptoms, or comply with a self-isolation recommendation or order from a public health official or health care provider are capped at $511 per day for purposes of the payroll tax credit; Sick leave wages paid to employees caring for a family member or for a child whose school or place of care has been closed, are capped at $200 per day; and Family leave wages under the expanded FMLA taken into account for each employee are capped at $200 per day and $10,000 for all calendar quarters.
HR6201 Tax Credits?

- If the credit exceeds the employer’s total Social Security payroll tax liability for any calendar quarter, the excess credit is refundable to the employer. Employers may elect to not have the credit apply. A similar refundable tax credit is available for self-employed individuals.

- A chief concern --- Pay now. Get relief later!
Objectives in Formulating Response to COVID-19

- All employers need to consider how best to decrease the spread of acute respiratory illness and lower the impact of COVID-19 in their workplace, while trying to maintain operations to the greatest extent possible.
Objectives in Responding to COVID-19

- Reducing transmission
- Protecting people who are at higher risk for adverse health complications
- Maintaining business operations
- Minimizing adverse effects on other entities in supply chain

***While workplace wage/hour mandates, discrimination, termination and other traditional HR and legal regulatory requirements are secondary at this point in time... THEY ARE IMPORTANT TO STILL RECOGNIZE AND NOTE. The Plaintiff’s Bar is paying attention and already advertising services related to COVID-19.
Essential vs. Non-Essential Biz...

Per PA Gov. Tom Wolf’s Request...

- Non-essential businesses include public-facing industries such as entertainment, hospitality, and recreation facilities, including but not limited to community and recreation centers; gyms, including yoga, barre and spin facilities; hair salons and barber shops, nail salons and spas; casinos; concert venues; theaters; sporting event venues and golf courses; retail facilities, including shopping malls except for pharmacy or other health care facilities within retail operations.

- Essential services and sectors include but are not limited to food processing, agriculture, industrial manufacturing, feed mills, construction, trash collection, grocery and household goods (including convenience stores), home repair/hardware and auto repair, pharmacy and other medical facilities, biomedical and healthcare, post offices and shipping outlets, insurance, banks, gas stations, laundromats, veterinary clinics and pet stores, warehousing, storage, and distribution, public transportation, and hotel and commercial lodging.
Essential vs. Non-Essential Biz…

- IL Governor issued EO 2020-07 banning public and private gatherings of more than 50 people. However, the EO expressly noted that venues that provide essential goods or services --- such as (BUT NOT LIMITED TO) grocery stores, pharmacies, gas stations, hospitals, banks and credit unions --- can stay open. ***He has also come out to state that manufacturers can stay open. His list ESSENTIALBiz was not meant to be exclusive. (IN Governor has issued similar directives.)
Workplace Practices

- Immediately send home employees who appear to be ill (particularly, Fever, Cough, Shortness of Breath, Body Aches) upon arrival to work or during the day.
- Emphasize coughing/sneezing etiquette and hand hygiene.
- Implement a NO CONTACT policy.
- Try and implement remote working arrangements to the extent greatest possible. ***You may have no choice in coming days...***
- Try and separate workers in the office or plant with the 6-feet rule.
- NOTE: More employers are requiring TEMPERATURE scans at the start of each shift. ***While we do not necessarily recommend, it is becoming more common – at least instructing workers to check their own temperature each day before arriving to the workplace.
- Encourage private transportation to and from work.
- Close off the break room or café.
- Stagger shifts more --- less bodies using certain facilities at certain times (i.e., Locker rooms).
Workplace Environment

- Provide tissues, no-touch disposal receptacles, soap and water, and alcohol-based hand rubs with at least 60% alcohol.

- Perform routine environmental cleaning of all frequently touched surfaces and provide disposable wipes so that commonly used surfaces can be wiped down before use (e.g. conference tables, reception areas).

- PPE considerations --- gloves, masks, eye protection -- particularly on manufacturing, assembly lines.
An employee who thinks they may have been exposed...

- Employees who have a sick family member at home with COVID-19 should notify HR.
- If an employee is confirmed to have COVID-19, the employer should inform fellow employees of the possible exposure but maintain confidentiality. Contact local health department for guidance --- but you do not have to shut down. For now... this can be managed. (see next slide)
- Exposed employees should refer to CDC guidance for how to conduct a risk assessment of their potential exposure. KNOW THE SYMPTOMS. (see next slide)
If an Employee tests positive (or, presumed to have the virus by a health care provider)...

- Have employee identify anyone they worked closely with in the prior 14 days (including customers and vendors)
- Undertake a deep cleaning of affected workspaces
- If shared building or area, notify building management so they can take any precautions they deem necessary
- Employees with contact to the Employee who tests positive or is presumed to have the virus must monitor themselves for the development of any of the following symptoms: fever (temperature of 100.4 or higher), cough, aches, or difficulty breathing. If they develop any of these symptoms, they must contact a health care provider and stay home until the doctor says they can return to work or are free of fever, signs of a fever, and any other symptoms for at least 24 hours, without the use of fever or other symptom reducing medication, whichever is later. ***May want to demand both!!!***
OSHA Considerations

- OSHA regulates all employers.
- Both general and industry specific standards regarding employee safety in the workplace.
- No specific rule mandating precautions employers need to take to protect workers from COVID-19.
- OSHA expects employers to follow the “general duty clause” of the Occupational Safety and Health Act, which says **workplaces must be free of known hazards that can be corrected**.
OSHA Tracking Requirements

- OSHA requires employers with 10 or more workers to keep a log of every workplace injury or illness that requires medical treatment beyond first aid or keeps a worker away from work for at least one day.

- Guidance issued in early March requires employers to track COVID-19.

- If an employer doesn’t know whether the illness occurred at work, OSHA rules say the employer must evaluate the employee’s work duties and environment to decide whether exposures at work either caused or contributed to the illness.
OSHA Tracking Requirements (cont’d)

- Colds or flu do not need to be tracked (specific exemption).
- For workers who decide not come to work because they have cold/flu symptoms, that by itself won’t require employers to track the cases.
- If a test later shows worker has COVID-19, the employer would need to consider if the infection was work-related and recordable.
Review Paid Leave Policies

Questions to Ask:

- How does your current policy accommodate personal and family illnesses?
- How will you apply your paid leave policy in the event of a school or child care facility closing?
- In the midst of an epidemic, will you still require the same level of leave substantiation (e.g., doctor's notes) that it normally requires?
- Do you relax your “no fault” attendance policy? ***Be sure to note that this is purely for the COVID-19 outbreak/pandemic.
- Is the implementation of flexible leave policies an option—even if temporary?
- Do you know and understand all Local, State and Federal paid mandates (existing and those in development – i.e. H.R.6201).
Family Medical Leave Act (FMLA)

- An employee could potentially qualify for FMLA if the employee becomes seriously ill from COVID-19 or is caring for a family member that is seriously ill from COVID-19 and all other FMLA eligibility requirements are met.
- Must meet the FMLA definition of a “serious health condition”
Under the FMLA, a serious health condition must fall into one of these six categories:

- inpatient care;
- incapacity for more than three days with continuing treatment by a health care provider;
- incapacity relating to pregnancy or prenatal care;
- chronic serious health conditions;
- permanent or long-term incapacity; and
- certain conditions requiring multiple treatments.
So... is Coronavirus a serious health condition?

Probably... and, if a health care provider orders someone to self-quarantine --- then it’s very likely FMLA will apply.

- FMLA regulations define “serious health condition” expansively, stating that: “an illness, injury, impairment or physical or mental condition that involves inpatient care ... or continuing treatment by a health care provider.”

- “Continuing treatment” includes incapacity of more than 3 days that involves treatment 2 or more times within 30 days of the first day of incapacity, or treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment. **Treatment may be by phone.**
Serious Health Condition

- There are certain ailments that don't typically qualify as serious health conditions under the FMLA, including:
  - colds and flu, earaches, upset stomachs and minor ulcers, headaches (other than migraines)

- FMLA rules provide: “ordinarily, unless complications arise, the common cold, the flu ... are examples of conditions that do not meet the definition of a serious health condition”
Consider:

- *Regarded as* disabled
- *Complications* arising out of COVID-19
- *Permanent effects* of the illness
- *Association* discrimination is a viable theory
FMLA/ADA Compliance
Recommendations & Strategies

- **Be aware** of FMLA and/or ADA issues (remember, requests do not need to specifically mention the "FMLA" or "ADA")

- **Engage** the employee in the interactive process – specifically as it relates to the employee's ability to perform the job (ongoing requirement)

- **Involve your HR team!!** (They know the law and need to respond within statutory time frames!)

- **Be consistent** in your treatment of employees – treat all potentially communicable illnesses similarly (and rationally)
Employee Pay During Time Off

- If an employee is absent due to illness or quarantine and is not performing any work, an employer can require the employee to use accrued sick leave or other paid time off.

- If an employee has exhausted paid time off, and an employer is not able to provide additional paid leave, the employer is not generally legally obligated to pay the employee for the time off. **Certain limits apply to Salary/Exempt Workers --- those falling under a paid sick leave policy can have pay docked for missing full days due to illness --- some states (i.e. CA) have limited this a bit.**
Wage/Hour Considerations

- **Nonexempt Employees:**
  - Time away from work can be unpaid (subject to leave policies)
  - No hours = no pay (absent contract, CBA or unique local or state law in limited, rate circumstances)
  - All hours worked must be recorded and submitted by the worker if permitted to work remotely

- **Exempt Employees:**
  - Time away from work can be generally unpaid as long as it is in full-day increments *if it is voluntary and initiated by exempt employees*
  - For time off mandated by employers, the time away from work for exempt employees can be unpaid IF in full-week increments (i.e. Furloughs)
  - Generally, an exempt employee must be paid weekly salary for any week in which she performs ANY work. (i.e. Furloughs)
Furlough vs. Layoff

- More employers, right now, are utilizing temporary furloughs vs temporary layoffs.

- Layoffs = termination event. ***eligible for UI benefits and all earned wages at time of separation (i.e. PTO)

- Furloughs = employment remains intact. ***eligible for UI benefits but employment relationship has not been severed

***Please check your underlying health/welfare and retirement plan documents to ensure you understand the impact of the difference here.

***Employers can also modify wage rates/salaries --- provided it is not a common occurrence and prospective.
Short-Term Disability Benefits

- Employees who become ill with the virus may be eligible for benefits under a short-term disability policy, depending on the terms of the policy (i.e. waiting period, covered illnesses).
- Typically disability policies do not provide benefits when an employee is unable to work due to quarantine.
Unemployment Benefits

- Employer-instituted quarantines, temporary shutdowns or mass layoffs could entitle workers to unemployment benefits
  - Depends on the size and length of the temporary shutdown
  - Other unemployment requirements must be met

***NOTE: An employee refusing to work due to FEAR of catching the virus is (at this time) will likely be deemed as REFUSING SUITABLE WORK and, therefore, ineligible for UI benefits. BUT... note that the Plaintiff’s Bar is looking at this as a possible “RETALIATION” theory down the road.
Labor Relations Considerations

- Employers operating in a unionized work environment have additional concerns regarding planning.
- Unionized employers should closely review their collective bargaining agreements to determine whether special provisions have been made in the event of a disruption of business operations.
- For example, some agreements may have provisions that provide paid time off to union workers in the event of an emergency when employees are prohibited from reporting to work.
Worker’s Compensation

If an employee contracts COVID-19 from a coworker will he qualify for worker’s compensation benefits?

- Typically not.
- Depends on whether the illness or exposure “arose out of employment” and was “in the course and scope of employment.” ***Difficult to prove.
- The type of worker and the workplace environment are critical factors in making this decision (i.e. healthcare workers may qualify).
Fear of Infection

- An employer is **not** required to accommodate employees’ fear of infection – (however, this could lead to treatment for anxiety, depression, etc…) --- be careful

- Employees do not have a right to work from home if the business does not accommodate the practice
  - Balance business needs with the decreased risk of infection to the workforce and community
What’s the Interplay with WARN?

- Federal WARN requires employers to provide displaced workers, certain 3rd parties (i.e. representative union) and government bodies an advanced 60 day Written Notice for a plant closing or a mass layoff. A plant closing is defined as 50 or more employment losses at a single site of employment in a 90-day period that results from ceasing operations in one or more operating units. A mass layoff is defined as 50 or more employment losses at a single site of employment in a 90-day period that also involves 33% of the active workforce at the site. NOTE: Employees with less than 6 months of service in the prior 12 months, or who work less than 20 hours per week, are not counted.

- Temporary layoffs of less than 6 months are not counted as an employment loss under Fed WARN.

- NOTE: Some states have their own mini-warn laws that require notice of 30, 60 or 90 days --- and some states still consider temporary/short layoffs for purposes of its mini-warn law (i.e. CA).
What’s the Interplay with WARN?

- Under the current circumstances, the timing requirement will likely not be possible --- and, it’s probable the timing requirement would not cause any legal issues for employers due to any one of the 3 general Federal WARN exceptions to the timing requirement:
  1) faltering company,
  2) unforeseen business circumstances, or
  3) natural disaster.

  **BUT… NOTICE is still required to be given!!!**

- Also, some states don’t have certain exceptions in their mini-warn laws (i.e. CA does not recognize the “unforeseen business circumstances” exception).

***Know the differences between layoffs/RIFs vs. furloughs. AND note, a furlough could still trigger WARN issues --- depending on the length of the furlough and/or the location of the worksite.***
Additional Considerations

- Consider a review of insurance policies in regards to business interruption and third party claims.
- Evaluate technology infrastructure to determine extent of remote access that can be supported.
- Review business continuity plans to ensure situation presented by COVID-19 is addressed.
- Review borrowing needs (i.e. lines of credit) and review financial obligations carefully (i.e. bank covenants).
- Read our BLOG page for updates...
THANK YOU!

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SA COVID-19 WORKPLACE TASK FORCE

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