CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: COVID-19 Brings Rapid Changes to State and Local Leave Laws

MARCH 23, 2020

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Over the past month, and especially in response to the growing COVID-19 epidemic, states across the country have been proposing and passing new employee benefits legislation. Much of that legislation has focused on the provision of paid sick leave to employees, with a number of states already enacting emergency legislation to provide leave for employees being displaced due to the virus.

Colorado

On March 11, 2020, the Colorado Department of Labor and Employment published emergency rules, the Colorado Health Emergency Leave with Pay ("HELP") Rules, temporarily requiring employers in certain industries to provide paid sick leave to employees awaiting COVID-19 testing and results.

Covered industries include leisure and hospitality, food services, child care, education at all levels (including related services such as transportation and food preparation), home health care, operating a nursing home, and operating a community living facility.

Employers in covered industries must provide up to four calendar days of paid sick leave to any employee who (A) has flu-like symptoms and (B) is being tested for COVID-19. The four days run consecutively and include weekends (*e.g.*, Thursday-Sunday). Such sick leave ends if the employee receives a negative test result. Employers that already offer at least four days of paid leave do not need to provide additional leave under the HELP rules. The HELP rules only provide emergency paid leave to cover the period required for testing. The rules do not require wage employers to provide wage replacement should an employee test positive and require quarantine resulting in lost work time.

Employees must give notice of the need for leave under the HELP rules as soon as practicable, and preferably, within 24 hours of being prescribed the test. Employers may request documentation from a health care provider showing the prescription of a COVID-19 test and date thereof, or from provider of the test showing that the test was performed and the date thereof; provided, however, that an employer may not terminate an employee for inability to provide documentation during an illness covered by the HELP rules.

The HELP rules remain in effect until the later of: (i) April 10, 2020 and (ii) such time as the state of emergency declared by the Governor ceases.

Maryland

On Thursday, March 19, 2020, Governor Hogan approved an emergency act that gives the governor certain emergency powers for the duration of the state of emergency that was declared on March 5, 2020. These emergency powers include, among other things, the authority to prohibit employers from terminating employees solely on the basis that the employee has been required to be isolated or quarantined. The Act also authorizes the Secretary of Labor to determine that an individual is eligible for unemployment benefits, even if they have not separated from their employer, if: (i) the individual's employer temporarily ceases operations due to COVID-19, presenting the employee from coming to work; (ii) the individual is quarantined due to COVID-19 with the expectation of returning to work after the quarantine is over; or (iii) the individual leaves employment due to a risk of exposure or infection of COVID-19 or to care for a family member due to COID-19.

New Jersey

On Friday, March 20, 2020, New Jersey enacted emergency legislation prohibiting employers from terminating or otherwise penalizing an employee if the employee requests or takes time off from work under certain conditions, for the duration of the state of emergency declared by the Governor in Executive Order 103 of 2020. In order to be protected by this Act, an employee must request or take time off pursuant to a written recommendation of a medical professional instructing the employee to take time off for a specified period of time because the employee has or is likely to have an infectious disease which may infect others in the workplace. The Act further prohibits employers from refusing to reinstate such an employee in the position the employee previously held without reduction in status, pay or benefits.

New York

On Wednesday, March 18, 2020, the New York State Legislature passed, and Governor Cuomo signed into law, an emergency bill requiring employers to provide differing amounts of sick leave to employees affected by COVID-19, based on employer size. Leave under the law is limited to any employee subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19, except when an otherwise eligible employee is asymptomatic or not yet diagnosed and is physically able to work while under quarantine or isolation (including remote work). An mandatory or precautionary order of quarantine or isolation due to COVID-19 is sufficient to trigger the leave if issued by the State, the Department of Health, or any governmental entity.

Employers of 10 or fewer employees must provide unpaid sick leave to any affected employee. During such period, the employee is eligible to use the state's paid family leave benefits and temporary disability benefits.

Employers of 11-99 employees (and those of 10 or fewer employees, but net income greater than $1 million in the preceding tax year) must provide at least five days of paid sick leave to affected employees, and unpaid leave thereafter, during which such employee is eligible for paid family leave and temporary disability benefits.

Employers of 100+ employees (and all public employers) must provide at least 14 days of paid sick leave to affected employees. For purposes of the law, "public employer" includes: (i) the state; (ii) a county, city, town or village; (iii) a school district, board of cooperative educational services,

vocational education and extension board or a school district; (iv) any governmental entity operating a college or university; (v) a public improvement or special district including police or fire districts; (vi) a public authority, commission or public benefit corporation; or (vii) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of New York.

Leave under this law is to be provided without loss to an employee's existing accrued sick leave. However, the law provides that if the federal government provides for sick leave benefits related to COVID-19, the provisions of the NY law are only available to the extent they exceed the benefits under the federal law.

Pittsburgh, PA

Unrelated to the COVID-19 epidemic, the long-stayed City of Pittsburgh paid sick leave ordinance finally took effect on March 15, 2020 after years of litigation. The ordinance is not an emergency measure but rather a permanent law requiring employers to provide employees with paid sick time, similar to the many other state and local laws that have popped up around the country in recent years.

Beginning on March 15, 2020 or the commencement of employment, whichever is later, all employers of fifteen or more employees must provide paid sick time at a rate of one hour for every 35 hours worked in the city of Pittsburgh, up to 40 hours per year. Accrued, unused sick time carries over from year to year; provided, however, that at no time can an employee’s total available sick time exceed 40 hours. Alternatively, employers may avoid the carryover requirement by frontloading 40 hours of paid sick time each year.

Employers of fewer than 15 employees need only offer unpaid sick time up to a cap of 24 hours.

Employees may begin using accrued sick time on the 90th calendar day after the commencement of employment. Sick time may be used for:

1. An employee’s own illness, injury, health condition, or need for medical care;
2. Care of a family member with an illness, injury, health condition, or who needs medical care; or
3. Closure of the employee’s place of business by order of a public official due to a public

health emergency or an employee’s need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency, or care for a family member when it has been determined by the health authorities or by a health care provider that the family member’s presence in the community would jeopardize the health of others.

Employers need not provide any payment for unused sick leave upon the termination of employment. However, if an employee is rehired within six months, all previously accrued but unused sick time must be reinstated. Finally, if an employer has an existing paid leave policy that is at least as generous (in terms of both amount of leave and conditions for use) as that required by the ordinance, such employer need not provide additional sick time under the ordinance.

Washington D.C.

Effective Tuesday, March 17, 2020, the Council of the District of Columbia enacted the COVID-19 Response Emergency Amendment Act of 2020, which provides a number of workforce protection. In the employment context, the Act amends the District of Columbia's FMLA statute to waive the one-year employment and 1,000 hour work requirements for eligibility during periods when the Mayor of D.C. has declared a public health emergency. These relaxed eligibility requirements only apply to employees who have been ordered or recommended to quarantine or isolate by the Department of Health, any other agency, or a medical professional.

The Act also provides that any employee who is unable to work as a result of circumstances giving rise to a public health emergency during a period for which the Mayor has declared a public health emergency is entitled to "declaration-of-emergency" leave during such period. At this point, however, the Act is light on additional details regarding declaration-of-emergency leave.

Take Aways

Given the rapidly evolving nature of the COVID-19 epidemic, the state of the law in many jurisdictions is changing daily as legislators scramble to respond. Many states have introduced proposed legislation to address employee needs during this epidemic. These bills are likely to change and possibly expand over the coming days. Employers should consider reviewing their existing employee leave policies for compliance with the recently enacted legislation. In the interim, Benesch stands ready to assist with any questions as we closely follow COVID-19 developments and support client's response efforts.

Please contact a member of Benesch's Labor & Employment Practice Group with any questions.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

