SURVIVING THE CORONAVIRUS: 
An Employer’s Guide to Addressing Some of the Most Pressing Employee Issues

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March 20, 2020

In just the last week, many Massachusetts employers have seen their businesses upended overnight due to the COVID-19 pandemic. Faced with mandated closures, government guidelines/mandates on how many employees may be at work, and countless other issues, Massachusetts employers are asking a number of questions, among which are:

1. What are the particulars of the new relief legislation for employees/employers that Congress passed Wednesday night, March 18th?
2. What are employers’ options regarding furloughs, temporary/permanent layoffs for Exempt (salaried) and Non-exempt (hourly-paid) employees?

Both of these questions will be answered below. Additionally, I will introduce a little-known program run by the Massachusetts Department of Unemployment Assistance (DUA) called the “Workshare Program.” Massachusetts employers may find the Workshare Program viable if they are looking to keep employees working -- albeit on a reduced schedule -- rather than lay them off.

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 18th, 2020 President Trump signed into law the second piece of legislation to deal with the COVID-19 pandemic. (The first piece of legislation was enacted on March 6, 2020 and consisted of an appropriation for emergency health equipment and supplies to the medical industry. A third piece of legislation is presently working its way through Congress and is, among other things, anticipated to consist of payments made directly from the government to individuals and economic relief to industry.) As soon as the third piece of legislation passes we will send you details. The purpose of this update is to advise employers on the of the March 18th legislation. There are three main components of the March 18th legislation: Paid Family and Medical Leave; Paid Sick Leave; and tax credits for employers.

Paid Family and Medical Leave

Under this provision, employees of private sector employers with less than 500 employees will be able to take up to twelve weeks of paid job-protected leave for leave necessitated by the coronavirus. This program will be under the auspices of the federal Family and Medical Leave and will provide employees with many of the same job protections, albeit for different leave reasons. One distinction between the FMLA and the new legislation is how “covered employer” and “covered employee” are defined for purposes of gaining access to this leave. Unlike the FMLA, which defines a covered employer as one with fifty or more employees and a covered employee as a person who has worked for his or her employer for no less than a year and who has worked no fewer than 1250 hours over the previous year, a covered employer under the new Act is simply defined as anyone who has worked for the employer for thirty days or more.

Purposes for which paid family leave may be taken

The purposes for which an employee may access the federal paid family and medical leave are:

• Being unable to perform the essential functions of one’s job (at the office or remotely, e.g., home) after being directed or advised by a public official or one’s health care provider to quarantine him or herself.

• Having to care for a family member who was similarly directed or advised to be quarantined.

• Having to care for a child under eighteen whose school or daycare is closed due to the coronavirus.

Pay elements

• The first two weeks of leave taken for one of these three reasons need not be paid under this law (though, as one will read below, those two weeks may be paid via the sick leave legislation that was also passed.) If the employee does not have qualifying access to the federal paid sick leave to cover the first two weeks of leave under this law and he or she does not have access to below detailed federal paid sick leave, the employee may choose, and the employer may require, the employee to substitute any of his or her accrued paid leave time to cover this two week period.

• The employee may receive up to two-thirds of his or her regular daily pay, up to $200 dollars per day and up to $10,000 in total.

• To the extent an employee’s regular weekly rate of pay fluctuates, the law directs employers to divide the affected employee’s total number of hours he or she was scheduled to
work during the six months immediately prior to the leave period and divide by twenty-six to arrive at his or her weekly rate.

- While the legislation provides little guidance on this point, there is language in the legislation that gives the Secretary of Labor the ability to carve out or exempt those small businesses employing fewer than fifty employees when the Secretary determines that paying this leave time might affect the business’ ability to continue to exist.

**Job Protection**

- General rule: Employees who access federal paid family and medical leave must be returned to the job they held immediately preceding the leave or an equivalent position.
- Exception: Employers with fewer than twenty-five employees need not return the employee if their former position or an equivalent if the position has been eliminated as a result of the coronavirus and the employer notifies the employee that it intends to rehire the employee if or her position or its equivalent if and when it becomes available in the twelve months from when the employee would have otherwise returned.

While there should be no confusion between this new law and the recently passed Massachusetts Paid Family and Medical Leave, please keep in mind that they are two separate pieces of legislation. The Massachusetts Paid Family and Medical Leave Act Leave Act does not take effect until January 1, 2021.

**Paid Sick Leave**

Irrespective of any paid sick leave to which an employee may be entitled to under his or her employer’s sick leave plan or the Massachusetts Earned Sick Leave law, the newly-enacted federal law provides:

- Two weeks of paid leave based on the employee’s regularly scheduled hours worked each week (up to forty per week and eighty hours total) if he or she is the one who is sick.
- Paid at his or her regular rate of pay or $511 per day whichever is less.
- Applicable to full and part-time employees alike, regardless of how long they have been employed by the employer.
- If the employee is accessing paid sick leave to care for a family member or child due coronavirus related symptoms, the employee will be eligible to receive the above discussed $200 maximum per day or his or her daily rate, whichever is less.
- The federal law entitles the employee to access this federal sick leave before he or she accesses any of his or her accrued sick or other paid leave time.
- As employers customarily do when an employee takes sick leave, the federal law allows the employer to require the employee to keep the employer apprised of his or continued need for the leave.
- Federal paid sick leave time may not be carried over from one year into the next.
- Employers will be required to conspicuously post a notice to employees apprising them of this leave entitlement. The U.S. Secretary of Labor will generate a model notice for employers to use.

**EMPLOYER TAX CREDITS**

Employers who pay employees for accessing one (or both) of the paid leaves discussed above, will receive payroll tax credits for up to one hundred percent of qualified employee wages paid by the employer. The tax credit will count towards the employer’s portion of the Social Security payroll taxes. Additionally, the tax credit will be increased to include money the employer pays towards the employee’s health insurance coverage while the employee is out on either of the above two federal leaves. The tax credit cannot exceed the employer’s total payroll tax burden on all employee wages.

**LAYOFFS/FURLOUGHS/WORKSHARE**

Many Massachusetts employers are grappling with what options they have regarding their employees -- especially where they are looking to retain good talent and to do the best they can by their valued employees -- because the business is either temporarily shut down or operating on a limited, scaled-back basis.

The three primary options are furloughs, layoffs, and the DUA’s “Workshare” program. Under either a layoff or a furlough the employee will receive his or her entire unemployment benefit since he or she is not working for the applicable period, while under the Workshare program he or she will be working a reduced schedule and will have his or her reduced wages for working reduced hours supplemented by some portion of his or her unemployment benefit.

Usually, for an employee in Massachusetts to be eligible to collect unemployment, he or she must first be out of work for at least one week (called the elimination period), and he or she must be actively looking for other employment and be ready and able to work if offered other employment. Recently, the US Department of Labor has directed states to loosen their requirements for the collection of unemployment occurring during this coronavirus pandemic.

In response, the Massachusetts Executive Office of Labor and Workforce Development and the Massachusetts Department of Unemployment Assistance (DUA) recently jointly filed emergency regulations regarding how unemployment claims will be handled during the pandemic. The regulations are expected to take effect immediately.

- First, the DUA is eliminating the one-week elimination period so employees who are laid off or furloughed will be eligible to collect unemployment beginning immediately upon being laid off.
• Second, for workplaces that shut down because of the coronavirus and the closure is anticipated to be four weeks or less, the employees will immediately be eligible to collect unemployment without having to look for other employment during the closure; so long as the employee is willing and able to return to work when called upon to do so. If, the employer concludes it will, or is required to be, shut down for up to an additional four weeks (eight total), the employees will be eligible to receive unemployment for those additional weeks as well. It is anticipated that the DUA will extend this eight-week period, as needed.

• Third, an employee who is subjected to a mandated quarantine imposed by a civil authority or medical professional will be eligible to receive unemployment during the quarantine period.

• Fourth, an employee who stops working because he or she was exposed to a reasonable risk of exposure or infection will also be eligible for unemployment.

• Fifth, an employee who stops working because he or she needs to care for a family member and is either: (a) not allowed to return to work or (b) does not intend to return to work, will also be eligible for unemployment.

As a benefit to employers, the Commonwealth will also allow employers to request up to a 60-day extension to file their quarterly unemployment contributions.

Whereas most Massachusetts employers are familiar with the particulars of a layoff, I will not now spend time detailing those here. If you have any questions regarding the mechanics of laying off employees, please feel free to contact me.

Furloughs
Unlike a layoff where an employee has no assurance or expectation of returning to his or her job, a furlough occurs when the employer requires the employee to take unpaid time off with the expectation that the employee will at some predetermined or generally anticipated date be returned to his or her job. Another difference between a furlough and a layoff is that employee benefits such as medical/dental coverage will be continued during the period of the furlough. Where a furlough is being implemented and the employees will not be working at all, the furloughed employee will be eligible for unemployment for any days for which he or she is not receiving any paid employer provided leave pay (e.g. vacation, etc.). In the event an hourly paid employee is asked to perform any work during the furlough, he or she must be paid only for time he or she actually performs work for the employer during a given week. Conversely, however, under the Fair Labor Standards Act, an Exempt employee must be paid his or her entire weekly salary for any week during which he or she performs any work on behalf of the employer. As such, the only way for an employer to put Exempt employees out on unpaid furlough is to have him or be out of work for an entire company work week.

To ensure that the employer will not have to pay an Exempt employee who is out on a furlough, the following factors must be met:

• The Exempt employee must be out work for an entire company work week, and each following unpaid leave period must also be in increments not shorter than a full work week.

• The Exempt employee must not perform ANY work for the employer on any given day during any week of the unpaid furlough. This includes not checking emails, not checking voicemails, not returning calls, etc. No work means no work!

• To ensure that the Exempt employee knows he or she may not perform any work during each furloughed week, employers should provide furloughed Exempt employees a written policy expressly precluding them from doing any work.

Massachusetts Workshare Program
Employers who are experiencing a downturn in business but who are still operating may wish to look into the DUA’s Workshare Program. It provides a means by which employees may work a portion of their schedule, e.g. half-time, and then receive a portion of his or her unemployment benefit based upon the half of his or schedule he or she is not working. For more information about the Workshare Program please check out the following link: https://www.mass.gov/workshare-for-employers

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