

Legislative Updates Oct 2020

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Agenda

- Secure Act
- Cares Act
- PPP
- FMLA and Paid Leave
- Tax Credits
- EEOC and the ADA
- OSHA
- What's Next?

Secure Act – 12/20/2019

Setting Every Community Up for Retirement Enhancement Act. Part of the Further Consolidated Appropriations Act of 2020

- Cadillac Tax repealed– (40% of value of benefits exceeding a threshold). Was to be effective 2022.
- PCORI Fees extended (2029) (self-insured plans paid per covered life) (patient-centered outcomes research institute fee).
- Paid Family Leave Tax Credit Extended – IRC 45S (through 2020). Business tax credit for qualifying employees for 2-12 weeks FMLA (if at least 50% of salary). Credit for 12.5-25% of wages.
- Health Insurance Providers Tax Repealed. The annual health insurance tax (HIT) on insurers that was part of ACA. (2021)
- Medical device tax repealed

CARES Act– 3/27/2020

Coronavirus Aid, Relief and Economic Security Act

- 2% Medicare Sequestration is suspended until end of 2020. (increase in fee-for – service payments.)
- Expanded Telehealth Provisions (waive coverage requirements)
- Net Operating Loss Carrybacks (losses from 2018 -2020 can be carried back 5 years). Typically no net operating loss carry backs (the Tax Cuts and Jobs Act (TCJA) of 2017).
- Interest Deduction Limits increase (50% deduction up from 30% of adjusted taxable income)
- Emergency Fund for Public Health/Social Services (\$100B fund) to cover COVID related costs.
 - Increase in Diagnosis Related Group (DRG) rate for COVID patients – 20%
 - Expands accelerated payment policy
 - Private health plans are required to cover COVID diagnostic tests and treatments (no co-pays)
 - COVID lab test to publish cash price for test
- Additional changes: Inpatient rehab facilities (IRF) are permitted to decrease from 15 hrs of intensive therapy to be eligible for coverage; home health services can be certified by nurse or physician assistant (for payment); waiving patient liability amounts for COVID tests and vaccines; expands uninsured individuals to include those who do not have minimum essential coverage under ACA; grant programs extended for 4 years (Rural Health Care Service Outreach, Rural Health Network Development and Small Health Care Provider Quality Improvement).

Employer Tax Credits and Deferrals

- Employee Retention Credit (CARES Act)
 - Refundable tax credit equal to 50% of up to \$10,000 in qualified wages (including health plan expenses) paid after March 12, 2020 and before January 1, 2021.
 - Eligible employers are businesses with operations partially or fully suspended due to COVID-19, or with significant decline in gross receipts compared to 2019.
 - **Cannot be used if employer received PPP loan.**
- Employer Payroll Tax Deferral
 - Allows employers to defer employers' share of Social Security tax between March 27, 2020 and December 31, 2020.
 - 50% due by 12/31/21; remainder due by 12/31/22.

Paycheck Protection Program (PPP)

- Loan program designed to provide small businesses with 2.5 months worth of payroll expenses as a forgivable loan, which can be used for payroll, rent, and utilities over 24 week period.
- Loan application period has closed.
- Lenders are beginning to accept forgiveness applications.
- Recipients have ten (10) months following the end of their 24 week period to apply for forgiveness.
 - Two (or five) years to repay any unforgiven amount at one percent interest.

Best Practices for PPP

- Document, Document, Document!
 - Bank account statements and/or payroll provider reports;
 - Tax forms for the periods that overlap with your 24 week period;
 - Payment receipts, cancelled checks, or account statements showing employer contributions to health insurance and retirement plans’
 - Documents show FTE numbers;
 - Utility payment documents;
 - Documentation showing terminations for cause, rejections of restorations of hours, etc.
- Prepare internal memo to file setting out contemporaneously the need for PPP loan.
 - SBA is likely going to give greater weight to contemporaneous reasons over after-the-fact justifications.

Families First Coronavirus Response Act (FFCRA) – 03/18/2020

- Enacted the **Emergency Paid Sick Leave Act** and **Emergency Family and Medical Leave Expansion Act**.
- Applies to businesses with fewer than 500 employees.

FFCRA Continued -

- **Emergency Paid Sick Leave**

- Up to eighty (80) hours of paid leave for full-time employees.
- Reasons:
 - Employee has been ordered to self-isolate/quarantine, is experiencing symptoms and is seeking a diagnosis, is caring for an individual who has been instructed to isolate, or the employee is caring for their child whose school or place of care has closed.
- Must be available for immediate use, regardless of how long employee has been employed.
- Full-rate of pay, **up to \$511/day** for employees who are personally sick or isolating.
 - For employees taking care of others or children, 2/3 rate of pay, up to \$200/day.

FFCRA Continued -

- Emergency Paid FMLA Leave
 - Allows employees to take up to twelve (12) weeks of FMLA leave.
 - First two (2) weeks are unpaid, but may substitute other paid leave for those weeks.
 - Only can be used for taking care of son or daughter under the age of 18, where the child's school or place of care has been closed due to COVID.
 - Paid at 2/3 rate of pay, up to \$200/day.
 - Employee must be employed for at least thirty (30) days before taking paid FMLA
 - Remember, only applies with schools would otherwise be open. Cannot take paid FMLA leave for times when school would otherwise be closed (i.e., winter break, summer break)

FFCRA Continued -

- Employers **must** post Notice notifying employees of rights under the FFCRA.
- Employers can receive payroll tax credits equal in amount of paid leave under the Act.
- In effect until December 31, 2020.
- Paid time off under this law **does not roll over** to following year.
- **IMPORTANTLY, “health care providers” can be excluded from this obligation.**

Best Practices for Paid Leave

- FFCRA
 - Get documentation from employees up front.
 - IRS will require documentation for tax credits.
 - Require employees to submit in writing:
 - Name;
 - Dates for which leave is requested;
 - The reason for leave;
 - A statement that the employee is unable to work because of one of the approved reasons; and
 - If ordered to isolate/quarantine, name of health care provider;
 - If taking leave due to school closure, include name of child, name of school, and statement that no other suitable person is available to care for child.
- Familiarize yourselves with FAQs from DOL and IRS:
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
 - <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

Equal Employment Opportunity Commission (EEOC) and the ADA

- How has the EEOC addressed COVID?
- No major legislation, but additional guidance related to existing regulations
- The Americans with Disabilities Act (ADA) remains in effect, but EEOC has adapted to COVID-19.
 - EEOC Pandemic Preparedness in the Workplace and the ADA:
<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- While employers cannot normally make “disability-related inquiries,” a pandemic declaration changes some requirements.

What Can Employers Ask/Require of Employees Related to COVID?

- During a pandemic:
 - Employers **may** send employees home if they display COVID-19 symptoms.
 - Employers **may** ask employees if they are experiencing symptoms.
 - Employers **may** ask employees why they have been absent from work.
 - Employers **may** take employees' temperatures.
 - Employers **may** require employees to wear PPE or adopt infection-control practices such as hand-washing.
 - Must still grant reasonable accommodations to employees with disabilities.

What Employers Cannot Ask/Require of Employees

- Employees **may not** ask employees who are not displaying symptoms if they have a medical condition which could make them especially vulnerable.
- Employees **may not** stop providing reasonable accommodations to employees covered by the ADA or Title VII.

What to do if Employee Requests a Reasonable Accommodation?

- Engage in interactive process with employee!
- Continue to grant reasonable accommodations to employees who request them due to a religious or disability-related need.
 - Remember a reasonable accommodation does not have to be the accommodation requested and does not have to be granted if it causes a “direct threat.”

Best Practices for Complying with ADA/Title VII

- Develop written COVID policies and make sure such policies are circulated to employees.
- Continue to encourage employees to take safety precautions and to self-report symptoms.
- Make sure you know which questions employer can and cannot ask.

Occupational Safety and Health Act (OSHA)

- Not a great deal of legislative action (so far).
- More focus placed on guidance than on new standards and regulations.
- General Duty Clause, Sec. 5(a)(1):
 - Each employer shall furnish to each of his employees employment and **a place of employment which are free from recognized hazards** that are causing or are likely to cause death or serious physical harm to his employees.
- How do orders like the North Carolina mask mandate intersect with duties under OSHA?

What's Next for the Rest of 2020 and 2021?

- As much unpredictability as the rest of 2020:
 - Fall/Winter Second Wave?
 - Many COVID relief provisions in FFCRA and CARES Act set to expire soon.
 - PPP entering forgiveness phase; paid-leave laws end on 12/31/20.
 - New challenge to the Affordable Care Act being heard by Supreme Court on November 10, 2020.
 - COVID-19 Vaccine on the Horizon.

Legislative Action Coming Down the Pipeline

- Next Stimulus Bill
 - Unlikely to occur before election.
 - May not occur until early-2021.
 - Wide-open possibilities for what might be included.
- FFCRA Extension
 - Even if stimulus is delayed, could see standalone FFCRA extension before end of year.
- Second Round of PPP Funding
 - White House recently floated idea of stand-alone legislation to fund second round of PPP loans.
- Workplace Safety Legislation
 - Possibility of temporary COVID-19 liability limitation legislation.
- Healthcare
 - If ACA is overturned, expect new health care legislation.
 - If ACA is upheld, could still see addition of public option, tweaks to existing law.

What About a Vaccine?

- Employers **cannot** require of their employees to take a vaccine, regardless of medical conditions or religious beliefs.
 - If an employee requests an accommodation due to a disability or a sincerely held religious belief, employer will likely need to grant that request.
 - Stay tuned for additional guidance once a vaccine is on the market.

Thank You

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