

Employment Law, Benefits and Related Tax Developments to COVID-19

Presented by Katten

March 26, 2020

Katten will host the "Employment Law, Benefits and Related Tax Developments to COVID-19" at 2:00 p.m. (ET) on Thursday, March 26. Employee Benefits and Executive Compensation partner Kate Ulrich Saracene and Employment Litigation and Counseling partners Julie Gottshall and Michelle Gyves will discuss the rapidly developing COVID-19 landscape as it relates to employment laws and related tax matters. They will cover the latest developments, how they are going to impact businesses and a discussion of what we are advising our clients. This is part of a broader webinar series being offered by Katten on the various legal implications of the COVID-19 pandemic.

To view the webinar materials, [click here](#).

To view the webinar recording, [click here](#).

Since this webinar was recorded, the U.S. Department of Labor has issued additional [guidance](#) that clarifies certain of the points addressed in the program:

- If a workplace is shut down, employees are not entitled to paid leave under the Families First Coronavirus Response Act ("FFCRA") (even if they otherwise meet one or more of the eligibility criteria). The guidance indicates that "[t]his is true whether [the] employer closes [the] worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive." An employee's recourse in such a case is to seek unemployment insurance benefits.
- Similarly, if an employee is furloughed or his or her hours are reduced, the employee is not entitled to paid leave under the FFCRA for hours the employee was not scheduled to work. Again, an employee's recourse in these cases is to seek unemployment insurance benefits.
- Paid leave under the FFCRA can be taken intermittently in certain circumstances with the employer's permission. If the employee is teleworking, paid leave can be taken intermittently with

the employer's permission regardless of the reason for the leave. If the employee is still working at the usual worksite (not teleworking), then paid leave can be taken intermittently only if taken to care for a child whose school or child care provider is closed.

- While leave under the FFCRA is a new entitlement, an employee can take a maximum of 12 weeks of leave under the Family and Medical Leave Act ("FMLA") during a 12-month period, meaning that if an employee already has taken some FMLA leave prior to April 1, 2020 (whether for a COVID-19 related reason or otherwise), the employee would only be entitled to the balance of the 12 weeks of FMLA (in addition to the 2 weeks of emergency paid sick leave).
- The usual exceptions to the FMLA job restoration requirements (*i.e.*, when the employer can show that employee would have been laid off even if he or she had not taken leave and/or when the employee on leave is a highly compensated "key employee") apply also to expanded FMLA leave under the FFCRA (along with the new exception for employers with fewer than 25 employees meeting the four-part hardship test provided in the new law).
- An employer with fewer than 50 employees can claim an exemption from the requirement to provide paid leave under the FFCRA due to school closure or child care unavailability if:
 - "Provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity."
- The new guidance also discusses acceptable forms of documentation, and notes that employers claiming the FFCRA tax credit to fund paid leave expenses must obtain and retain such documentation from employees. Employers are not required to provide leave if employees fail to provide materials sufficient to support the tax credit. The Internal Revenue Service (IRS) is expected to post applicable forms, instructions, and information regarding the procedures to claim a tax credit, including any needed substantiation to be retained to support the credit, [here](#).

For more information, contact [Emily Cunniff](#).

CONTACTS

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