

# **2021 EMPLOYMENT LAW UPDATE**

Ambria L. Lankford

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# **Starting Small**

## *Smaller Updates to Federal Employment Law in 2021*



# Preventing Identity Theft

- Employers can now choose to list solely the last 4 digits of an employee's Social Security number on W-2 forms.



# EEO-1 Data

- The EEOC waived the requirement that private sector employers submit EEO-1 data in 2020 because of the COVID-19 pandemic.
- In 2021, private sector employers with 100 or more employees must submit their 2019 and 2020 EEO-1 surveys.
  - This also applies to employers with 50+ employees and at least one federal contract or subcontract worth at least \$50,000
  - The deadline has not yet been announced but the data collection site is expected to open in April

# COVID-19 ISSUES

*Families First Coronavirus Relief Act*



# Families First Coronavirus Relief Act

## ■ General Provisions:

- Covered Employers – certain public employers, and private employers with less than 500 employees
  - Private employers with less than 50 employees may be exempted
- Eligible Employees – those who have worked for the employer for at least 30 days.
  - Health care providers or Emergency Responders may elect to exclude employees from eligibility for leave under the FFCRA

# FFCRA – Paid Sick Leave

- Emergency Paid Sick Leave at normal rate of pay for two weeks (up to 80 hours) with a \$5,110 aggregate cap ONLY if employee:
  - Under quarantine or isolation order from government entity;
  - Advised to isolate or quarantine by health provider; or
  - Has COVID symptoms and seeking a medical diagnosis

# FFCRA – Paid Sick Leave

- Emergency Paid Sick Leave at 2/3 normal rate of pay for two weeks (up to 80 hours) with a \$2,000 aggregate cap ONLY if employee:
  - Caring for person advised or ordered to isolate or quarantine;
  - Caring for a child whose school/childcare unavailable due to COVID-19; or
  - Experiencing substantially similar conditions specified by the Secretary of HHS



# FFCRA – Paid Sick Leave

- What if the employer has a shutdown or furlough due to COVID-19?
  - If the shutdown/furlough is due to a lack of sufficient work availability to sustain functions, no FFCRA coverage is available.
    - Employees may apply for unemployment benefits
  - If business required to close due to federal/state/local order, employees entitled to Emergency Paid Sick Leave at full rate of pay UNLESS can telework

# FFCRA – Expanded FMLA

- Employees Able to Telework
  - Employers MAY permit telework if job duties allow
  - Where teleworking is available, no FFCRA coverage available
  - Employee must rely on PTO or other accrued leave
- Otherwise, expanded FMLA available if employee:
  - Caring for child with unavailable school/care due to COVID
  - COVID diagnosis, or otherwise sick/disabled

# FFCRA – Expanded FMLA

- Expanded FMLA to Care for Child
  - Employee entitled to 12 weeks of expanded FMLA
  - First 10 days unpaid, but employee may use 10 days of Emergency Paid Sick Leave and up to 10 workweeks of expanded FMLA, both at 2/3 their normal rate of pay (not to exceed \$200 per day)
  - Leave can be taken intermittently

# FFCRA – Expanded FMLA

- Expanded FMLA Due to COVID Diagnosis or Other Illness
  - Employee must meet the normal statutory requirements of FMLA

***Remember to check whether the employee has already taken FMLA leave!***

# FFCRA – Employee Refusals

- What do you do if an employee refuses to return to work due to a COVID-related concern?
- ***No FFCRA Coverage for general fears of contracting COVID***
- If fear is related to the employee being a caregiver for an at-risk family member:
  - Normal Statutory FMLA leave may be requested
  - Will require that the family member have a qualifying illness

# FFCRA – Documentation

- What documentation can be requested from an employee seeking Emergency Paid Sick Leave Coverage?
  - An employee who requests FFCRA leave must provide (either orally or in writing) their name, the dates of requested leave, the reason for leave, and a statement that they are unable to work because of that provided reason. If leave is based on a quarantine or isolation order, the employee should also note the name of the issuing government entity or healthcare provider. If leave is based on childcare closure, the employee should note the name of the child, the name of the school/care provider, and a statement that no other suitable person is available to care for the child.
  - FMLA certification requirements remain in effect if taking leave for one of the existing qualifying reasons under the FMLA. For example, because the medical condition for COVID-19-related reasons rises to the level of a serious health condition.
- ***An employer cannot request further documentation or verification.***

# FFCRA – Unavailable Childcare

- Note that a school or daycare is not “closed” for purposes of FFCRA just because virtual learning is available.
  - **If the school is physically open, the employee is not eligible for leave.**
  - Virtual school must be the ONLY option available, or the school must be entirely shut down.
- If the employee has enrolled their child in virtual learning because the child has an underlying condition, they may apply for FMLA leave

# FFCRA – General Considerations

- FFCRA permits leave to care for an employee’s biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*.
- “Regular rate of pay” is the employee’s regular rate over a period of up to 6 months prior to the start of leave.
  - If they have not been employed 6 months, calculate using the average rate for each week they have worked
- Emergency Paid Sick Leave can only be taken once – only 2 weeks total (even if used intermittently)



# FFCRA – Tax Credits

- Employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA.
- Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage for those employees.

# FFCRA – Penalties

- Violating the Emergency Paid Sick Leave provisions will result in penalties under the Fair Labor Standards Act (“FLSA”)
- Violating the Expanded FMLA provisions will result in penalties under the Family Medical Leave Act
- “Good faith” is a defense and can show that violations were not willful
  - May be able to avoid liability by agreeing in writing with the Dept. of Labor to comply in the future

# FFCRA – 2021 Extensions

- Under the Consolidated Appropriations Act (CAA 2021), FFCRA covered employers may voluntarily extend FFCRA leave availability through March 31, 2021 and still receive the tax credit.
- Unused Emergency Paid Sick Leave originally did not carry over into 2021, but employers may not voluntarily choose to permit employees to carry over any remaining EPSL unused last year.
  - This does not mean the employees get MORE leave

# FFCRA – 2021 Extensions

- Expanded FMLA may also be extended into the first quarter of 2021
- It is unclear whether employees get another 12 weeks of EFMLA in 2021 or if they only get the rest of what was unused in 2020
  - This may depend on how the employer calculates its FMLA leave year (i.e., rolling basis vs. calendar year)
- BUT – employees can only receive 12 weeks total of regular FMLA and EFMLA combined

# COVID-19 ISSUES

*Americans with Disabilities Act*



# The Americans with Disabilities Act

- The ADA prohibits discrimination against individuals with a disability
  - Includes employees “perceived as” having a disability
- Requires employers to provide a “reasonable accommodation” where doing so would permit a disabled employee to perform the essential functions of their job.

# COVID-19 & Reasonable Accommodations

- A request for an accommodation to reduce risk of exposure is considered a request for an accommodation under the ADA!
- Consider the CDC guidelines regarding who is at higher risk for developing complications associated with COVID-19
- Accommodation requests should be seriously considered unless they will pose *undue hardship*

# Who May Receive an Accommodation?

- Employees with an “actual” disability or a “record of” a disability – as defined by the ADA.
  - ***This is a fairly low standard.***
  - There should be a connection between the disability and the need for the accommodation.
  - For example, the person should have an underlying impairment and limitation that, if infected with COVID-19, would lead to serious complications.



# Can you request documentation?

- Employers may seek information sufficient to establish the right to receive an accommodation where the impairment is not known or obvious.
- Includes:
  - (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the “essential functions” of his or her position.

# Can you request documentation?

- Note, however, such information is ***not*** required to approve an accommodation under the ADA and, given current circumstances, employers may want to consider being flexible with these types of requests.

# Can Employers Invite Employees to Seek an Accommodation?

- Yes. Both the ADA and the Rehabilitation Act permit employers to make information generally available to all employees about who to contact if they wish to request an accommodation for a disability that they may need. The employer may include in this notice (1) all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, (2) instructions about who to contact, and (3) an explanation that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

# Disability and Job Assignments

- Technically, an employer can take an employee's disability into consideration when making job assignments – even if the employee has not requested a reasonable accommodation.
  - If the employer knows that the employee has a medical condition, but the employee has not requested a reasonable accommodation, the ADA does not mandate that the employer take action.
  - The ADA does not permit employers to exclude employees, or take any other adverse action, solely because the employee has a disability that the CDC identifies as potentially placing him or her a higher risk related to COVID-19.
  - It is possible that an employee who has an underlying condition that places them at higher risk may nonetheless prefer to work in-person and bear that risk.

# The “Interactive Process”

- Remember that an “interactive process” should take place before a reasonable accommodation is put in place.
  - This process can be informal, adapted or shortened, but should at least involve some communication with the employee about their disability and proposed accommodation.

# Teleworking as an Accommodation

- Teleworking is likely a common accommodation request.
  - EEOC regulations define “reasonable accommodation” as any “[m]odifications or adjustments . . . that enable a qualified individual with a disability to perform the essential function of [a] position.” 29 CFR § 1630(o)(ii) (2001).
  - While an accommodation may “prove unreasonable because of its impact, not on business operations, but on fellow employees – say, because it will lead to dismissals, relocations, or modification of employee benefits[,]” an accommodation is usually reasonable on its face if it is feasible for the employer. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002).

# Undue Hardship

- You Can Deny a Reasonable Accommodation Due to “Undue Hardship”
  - This is “significant difficulty or expense”
  - An employer may consider whether current circumstances create “significant difficulty” in acquiring or providing certain accommodation, considering the facts of the particular job and workplace.
  - The employer also may weight the cost of an accommodation against its current budget when taking into account constraints created by the pandemic.

# Alternative Accommodations

- ***An employee is not entitled to the accommodation of their choice, just a reasonable accommodation.***
- If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. If the disability-related limitation can effectively be addressed with another form of reasonable accommodation at the workplace, then the employer can choose the alternative to telework.



# Alternative Accommodations

## ■ *Other Options:*

- additional or enhanced protective gear beyond what the employer may generally provide to other employees
- other protective measures like physical barriers
- elimination or substitution of particular “marginal” functions (i.e., incidental job duties)
- temporary modification of work schedule
- change in location of where the employee performs work (i.e., moving them to a place that permits more social distancing).



# Prioritizing Placement of Disabled Employees

- ***What if only a limited number of telework or alternative positions are available?***
- Employers are not required to prioritize placement of a disabled employee in an available job assignment over an otherwise qualified employee.
  - Ordinarily, the ADA does not require an employer to assign a disabled employee to a particular position if another employee is entitled to that position under some established system of assignment (for example, a seniority system). There usually must be special circumstances demonstrating that the assignment is nonetheless reasonable for that particular disabled employee.
  - ***BUT – it may be best under the circumstances.***

# COVID-19 ISSUES

## *Testing & Vaccines*



# Testing for COVID-19

- Employers may require COVID-19 testing as a condition to reentry into the workplace.
- Must be required for ALL employees
  - Remember the risk for discrimination claims
- The test must be “job related and consistent with business necessity”

# Testing for COVID-19

- EEOC requires that the test used be considered accurate and reliable by agencies such as the CDC and FDA
  - Antibody tests do NOT meet these criteria!
- What about periodic tests after employees have returned?
  - Generally ok, but must be applied to all employees.

# COVID-19 Vaccines

- Same criteria as for testing – employers may generally require all employees to take the vaccine
  - Due to risk of spreading the virus to coworkers, customers, or third-parties
  - Exceptions:
    - Bona fide medical or religious reasons
    - You may require documentation and consider other accommodations (i.e., masks)
  - Remember that the ADA and FMLA have different standards. Under the ADA, you don't have to place an employee in a comparable position with no change in pay or schedule.
    - Beware constructive discharge or retaliation claims

# COVID-19 Vaccines

- Potential claims by employees who are required to get the vaccine are likely related to unusual or unsafe administration of the vaccine.
  - Less likely if you ensure vaccine administered by a qualified provider

# COVID-19 ISSUES

*Occupational Safety and Health Act*





# OSHA

- The CDC defines “close contact” as it relates to COVID-19 exposure as someone “within six feet of an infected person for a cumulative total of fifteen minutes or more over a twenty-four-hour period starting from two days before illness onset . . . Until the patient is isolated.”
- Does not take the presence of PPE into consideration
- Implement necessary changes in your offices, because failing to do so may result in an OSHA violation.

# Workplace Safety & Retaliation

- Failing to implement necessary safety protocols may violate OSHA
- An employee who complains about an employer not following required protocols may file a “whistleblower retaliation” lawsuit if they suffer an adverse employment action after complaining.
- Employee usually entitled to monetary damages and may receive attorneys’ fees

# COVID-19 ISSUES

## *Technology Concerns*



# Zoom Meetings & Remote Work

- Zoom and social media are now part of the work environment, but failing to take safety precautions can cause liability for:
  - Violations of contracts like nondisclosure agreements
  - Loss of IP rights
  - Violation of employee or customer confidentiality
  - Smash Franchise Partners v. Kanda Holdings
    - No password on zoom = inadvertent disclosure of trade secrets and loss of IP rights

# Zoom Meetings & Remote Work

- Hourly employees purchasing their own supplies may see their wages drop below minimum wage.
- Salaried employees could lose their exempt status if they make large supply purchases.
- Employers should offer necessary supplies to employees who are teleworking!

# Zoom Meetings & Remote Work

- Employee codes of conduct still apply in the virtual setting.
- BUT – employers need to set clear boundaries.
  - Update your policies to include telework and technology policies.
  - Are employees using company provided devices?
  - Do you have access to their personal devices?
- Timekeeping and Monitoring may pose problems
  - Alternative work schedules may be permitted

# ANTICIPATING CHANGES

*Biden-Harris Administration*



# Minimum Wage

- President Biden's pandemic relief plan includes increasing the federal minimum wage to \$15 per hour.
- Unclear whether this means the minimum wage would immediately (almost) double, or if it will incrementally increase over a period of a few years.
- Highly contested issue!



# Further Expansion of the FFCRA

- The FFCRA can be voluntarily expanded into March 2021.
- The Biden administration is likely to push for further expansion of leave availability as the pandemic continues at high rates of infection.

# Independent Contractors

- In September 2020, the DOL proposed a new rule covering independent contractors – made it easier to deem persons contractors rather than employees.
  - Economic reality test – focuses on nature and degree of control and worker’s opportunity for profit or loss based on initiative/investment
- Biden Administration is likely to roll back this new rule, meaning increased risk for litigation over who is properly considered an independent contractor.

# Retaliation Claims

- Retaliation claims have begun to increase and likely will continue to do so.
- Discrimination claims resulting from disparate treatment with respect to COVID-19 policies are likely.

# QUESTIONS?

AMBRIA LANKFORD

AML@LANIERFORD.COM

256-713-2266

