Lincoln Financial Group®

GROUP BENEFITS

August 2020
Compliance Report

August 20, 2020

Absence Management, Paid Family and Medical Leave, Sick Leave and Accommodation Services Update

Family and Medical Leave

Federal

July 16, 2020:
The United States Department of Labor (DOL) published updated optional-use forms for FMLA, with a new expiration date of June 30, 2023. The DOL updated the forms to make them easier to understand for employers, leave administrators, healthcare providers and employees. Employers can continue using the previous version of the DOL FMLA forms as these are still in compliance with the regulations and collect the same information. Employees who used the previous certification forms do not have to provide their employer with the same FMLA information using the revised certification forms. More information on the new FMLA forms can be found on the DOL website.

July 16, 2020:
The Department of Labor Women's Bureau issued a Request for Information (RFI) seeking information on the impact of paid family and medical leave. The DOL is requesting comment on the effectiveness of current state- and employer-provided paid leave programs and the impact that access or lack of access to paid leave programs has on women and their families. The information provided will help the DOL identify promising practices related to eligibility requirements, related costs and administrative models of existing paid leave programs. Comments to DOL are due on September 14, 2020. More information is available on the DOL RFI.

July 17, 2020:
The Department of Labor issued a separate RFI regarding the regulations implementing the Family and Medical Leave Act of 1993 (FMLA). The information provided will help the DOL identify topics for which additional compliance assistance could be helpful, including opportunities for outreach to ensure employers are aware of their obligations under the law and employees are informed about their rights and responsibilities in using FMLA leave. Comments to DOL are due on September 15, 2020. More information is available on the DOL RFI.

Massachusetts

August 12, 2020:
Massachusetts has provided more guidance on exemption renewals for fully insured and self-insured private plans. For fully insured plans, previously filed exemptions are extended until December 31, 2020. The renewal application period will open on November 30, 2020. Employers will be expected to renew their exemption in MassTaxConnect by providing the Department of Family and Medical Leave (DFML) with their policy form number via a carrier-issued Insurance Declaration Document (IDD) on or before December 31, 2020. For self-insured plans, the renewal exemption deadline will not be extended. Employers must submit their self-insured IDD and a copy of the required surety bond, with the bond amount calculated using the revised surety bond calculator by September 30, 2020.
Note: the state is not expecting employers to submit a copy of their plan document for approval.
Additional guidance on renewing a private plan exemption is available on the DFML website.
Additional information on the self-insured application process is also available on the DFML website.

Connecticut

July 21, 2020:
The Paid Family Medical Leave Insurance Authority (Authority) published a Notice of Intent to Adopt Procedures Relating the Application to Utilize a Private Plan, and solicited written comments regarding these procedures to be submitted by August 21, 2020. The full text of the Notice can be found on the Connecticut Law Journal. Among others, the proposed procedures require employers to provide documentation that their private plans have been approved by a majority vote of its employees and that the vote complied with the requirements of the Authority. Please note that the Authority has not yet published a timeline for the announcement of final procedures nor the effectivity thereof.

New Hampshire

July 10, 2020:
Governor Sununu vetoed a bill (H.B 712) that would have established the state's PFML program for all employees. The bill would have provided employees with up to 12 weeks of PFML, funded by employee contributions. The current version mirrored language in last year's bill (S.B. 1) which was also vetoed by Governor Sununu. In the Governor's veto message last year, he objected to imposing an income tax on all New Hampshire workers; this year's veto message reiterated that, although characterized as a "premium on wages" or a "payroll deduction", the employee payments still functioned as an income tax.

Sick Leave

Colorado

August, 2020:
The Colorado Department of Labor and Employment (CDLE) updated its website with Interpretive Notices & Formal Opinions (INFOs) on the Healthy Families and Workplaces Act (HFWA). INFO No. 6A covers the 2020 requirements of paid leave under the HFWA; through December 31, 2020, an employer must provide up to two weeks of paid leave (up to 80 paid hours) for the three categories of COVID-related needs in the HFWA. HFWA coverage broadens on January 1, 2021, and is explained in INFO No. 6B, which covers the HFWA requirements as of 2021. As of January 1, 2021, HFWA requires less paid

leave -- one hour per 30 hours worked, with a maximum of 48 hours' paid leave a year -- but covers a broader range of conditions. The INFOs can be found on the CDLE website. The CDLE also uploaded a model notice and poster that can be used for compliance with the law's notice and posting requirements in 2020. The paid leave poster can be found on the CDLE website.

Other Leave

Puerto Rico

August 8, 2020:
Puerto Rico enacted House Bill No. 2424, which is an amendment to the Puerto Rico Working Mothers Protection Act, a maternity leave law. More specifically, this amendment expanded the portion of maternity leave for adoption reasons to now be extended to mothers adopting children that are six years old or more to take up to five weeks of maternity leave. Prior to this amendment, the maternity leave for adoption reasons was only available to mothers who adopt children five years old or younger that were not yet going to school. Please note this law is still only applicable to mothers.

Bernalillo County, New Mexico

June 16, 2020:
The implementation of Bernalillo County's Employee Wellness Act, which is a paid time off ordinance originally scheduled to start on July 1, 2020, was pushed back 90 days by the County Manager who enacted the postponement under emergency powers due to the coronavirus situation. The act's new effective date will be October 1, 2020. The Bernalillo County Employee Wellness Act provides employees with earned paid leave which may be used for any reason. This applies to all private sector employers with two or more employees in the county's unincorporated areas and will not apply to employers in Albuquerque. Employers may recall that although it is presented as a universal paid leave law, this ordinance actually functions like a paid sick leave law given its accrual rate, carryover rules, and payment of benefits.

In the News

June 25, 2020:
The U.S. DOL announced that a Pep Boys location agreed to pay an employee $10,094 in back wages after investigators found that the company did not allow the employee to return to work after an FMLA job protected leave even after being cleared by a physician. Pep Boys also did not keep records of the FMLA and did not provide the employee with the required FMLA designation notice.

June 29, 2020:
The EEOC announced that Powerlink Facilities Management Services has agreed to pay a $25,000 settlement in an employment discrimination lawsuit alleging that they did not provide a reasonable accommodation to a deaf employee. Powerlink used videos during orientation that did not have closed-captioning capabilities. Instead of accommodating the employee, the company stated they could not complete the process. As a result, the employee was not able to complete orientation and start work for two months. In addition to monetary relief, Powerlink is required to have ADA training and report back to the EEOC.

July 6, 2020:
The EEOC announced that ASICS America Corporation has agreed to pay a $49,650 settlement in an employment discrimination lawsuit alleging that the company failed to engage in the interactive accommodation process for a temporary worker with hearing and speech disabilities. After the employee went through an orientation meeting, human resources advised her that they could not employ her due to her disabilities. In addition to monetary relief, ASICS will update their disability discrimination policy and describe the accommodation process, then distribute this to employees and have them confirm receipt within 90 days. ASICS will also provide training to management and human resources staff on disability discrimination and accommodations.

July 16, 2020:
The EEOC announced that Brock Services, LLC has agreed to pay a $35,000 settlement in an employment discrimination lawsuit alleging that the company terminated an employee due to their disability. The employee had been with Brock Services for eight years, once the company found out about their glaucoma-related vision disability they required three eye exams to be conducted, despite their ability to perform the functions of the job, and subsequently fired the employee. In addition to monetary relief, Brock Services must not discriminate similarly in the future and administer training for managers about disability discrimination.

In the Spotlight: COVID-19

Lincoln Financial is here to help you remain confident and prepared during this evolving situation. We're continuously monitoring the latest news and information from the Centers for Disease Control and Prevention and other regulatory and medical experts to offer targeted guidance and support.
You'll find all this useful information on our dedicated COVID-19 Guidance page. We recommend bookmarking this page for important messages from our business leaders, timely updates on legislative changes specific to our offerings, employer best practices, and resources to support you as we navigate this unprecedented situation together.

Federal (New York court ruling)

August 3, 2020:
United States District Court for the Southern District of New York Invalidates Several FFCRA Final Rule Provisions

On August 3, 2020, the United States District Court for the Southern District of New York invalidated parts of the Final Rule implementing the Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA), both part of the Families First Coronavirus Response Act (FFCRA). The decision was pursuant to a lawsuit filed by the New York Attorney General in April 2020, challenging the Final Rule for unlawfully narrowing workers' rights to paid sick leave and emergency family leave during the COVID-19 pandemic. For more information on the lawsuit and this decision, please see the NY Attorney General's news release.

This decision is binding within the geographic jurisdiction of the Southern District of New York. The Southern District of New York encompasses the counties of New York (Manhattan), Bronx, Westchester, Putnam, Rockland, Orange, Dutchess, and Sullivan in the state of New York. Please note that the geographic jurisdiction of the Southern District of New York does not encompass all of New York City –

the Brooklyn, Queens, and Richmond (Staten Island) counties are part of another district court's jurisdiction.

While generally, district court opinions are not binding on other district courts or on courts of appeals, they may be considered persuasive authority. Many law firms are advising employers in other jurisdictions to exercise caution and be aware of the risk should this decision later be upheld or adopted in other jurisdictions.

The Department of Labor (DOL) has not appealed yet and/or applied for an emergency stay to the Second Circuit Court of Appeals. Its territory includes the states of Connecticut, New York, and Vermont, and decisions of the Second Circuit would be binding thereon. It is also possible that other states may likewise sue and obtain similar or different rulings in their local jurisdictions. In the alternative, the DOL of its own volition could amend the Final Rule for the changes to be consistently applicable nationwide. There are many questions that remain unanswered by the decision that will impact our administration of FFCRA leave. We are watching closely for further guidance and/or actions from the DOL and other states and will communicate any updates as soon as they are available. While certain provisions have been invalidated, the Court made clear that the rest of the rule remains in effect.

The invalidated FFCRA Final Rule provisions as a result of the New York lawsuit are as follows:

1. Work availability requirement

The work-availability requirement in the Final Rule is no longer applicable. An employee may take FFCRA leave even if their employer "does not have work" for them.

The EPSLA grants paid leave to employees who are unable to work (or telework) due to a need for leave because of any of six COVID-19- related criteria. The EFMLEA similarly applies to employees unable to work (or telework) due to a need for leave to care for a child due to a public health emergency. Originally, the Final Rule implementing each of these provisions excluded from these benefits employees whose employers "do not have work" for them.

2. Definition of "health care provider"

The expansive definition of "health care provider" in the Final Rule is no longer applicable. The standard FMLA definition of "health care provider" will apply.

Originally, the Final Rule defined a "health care provider" for the purposes of the FFCRA leave provisions as:

> anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions,

as well as:

> any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, [and] anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

The Final Rule provided that an employer whose employee is a health care provider or an emergency responder may exclude such employee from the EPSLA's Paid Sick Leave requirements and/or the EFMLEA's Expanded Family and Medical Leave requirements. This rule still applies and was not invalidated; however, the more limited definition of "health care provider" under the FMLA would have to be applied (e.g., an English professor, librarian, or cafeteria manager at a university with a medical school would no longer be considered "health care providers" excluded from FFCRA leave).

3. Intermittent leave

Employer consent for intermittent leave in the Final Rule is no longer applicable. An employer must allow intermittent leave, except when the leave is based on qualifying conditions that implicate an employee's risk of viral transmission (e.g., intermittent leave should be allowed for an employee to care for their son or daughter whose school or place of care is closed, but not for employees who may be infected or contagious from returning intermittently to a worksite where they could transmit the virus).

Originally, the Final Rule permitted employees to take Paid Sick Leave or Expanded Family and Medical Leave intermittently only if the employer and employee agree, and only for a subset of the qualifying conditions.

4. Documentation requirements

Submission of documentation prior to taking FFCRA leave in the Final Rule is no longer applicable. An employee cannot be required to provide documentation before taking FFCRA leave; verbal notice is sufficient. However, employees can still be required to provide documentation as long as it is not a precondition for taking leave.

Originally, the Final Rule required that employees submit to their employer, prior to taking FFCRA leave, documentation indicating, their reason for leave, the duration of the requested leave, and, when relevant, the authority for the isolation or quarantine order qualifying them for leave. The court held that a blanket (regulatory) requirement that an employee furnish documentation before taking leave renders the (statutory) notice exception for unforeseeable leave and the statutory one-day delay for paid sick leave notice irrelevant. Thus, the documentation requirements, to the extent they are a precondition to leave, cannot stand.

Please note: This alert is provided for informational purposes only and should not be considered legal advice. This information is being provided to Lincoln Financial Group clients so they may conduct any necessary internal evaluation of their policies and procedures. This alert is designed to provide informative and current information as of the date of the alert. Please contact your legal advisor with any questions regarding the laws discussed in this communication. Lincoln continually monitors activity related to family and medical leave laws and as laws pass, we will determine any impacts to our suite of products. Lincoln does not currently administer or track paid sick leave. The information contained herein includes information on major cities and counties and is not all inclusive of all city and county laws.

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