Labor and Employment Alert: Employers: Handling Your Employees' Back-to-School Plans

September 3, 2020

Employers are actively fielding a host of questions from employees about taking take time off from work to care for their children because of the COVID-induced closure or reduced schedule of day care centers and schools. Decisions by New Jersey employers are governed by the federal COVID paid leave law (the "Families First Coronavirus Response Act"), for businesses with less than 500 employees, and by the state leave law (the "New Jersey Family Leave Act"), for businesses with at least 30 employees. Employers also need to make their decisions without regard to any protected characteristic of the requesting employee, such as the person's sex, race, disability status, etc.

Recently the U.S. Department of Labor issued additional guidance, in the form of FAQs, to help employers. According to these FAQs:

- **If the school is operating on an alternate day (or other hybrid-attendance) basis** – an employee has the right to take leave "on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so."
- **If the school has given parents a choice between in-person or remote learning attendance, and if the employee has elected remote learning (even if for good reason)** – an employee does not have any federal leave rights "because your child's school is not 'closed' due to COVID-19-related reasons."
- **If the school begins the school year offering only remote learning but subsequently reinstitutes in-person learning** – federal leave rights arise only when the school is closed for in-person learning.

In all circumstances the employee must not have exhausted the full 2020 allotment of 12 weeks of federal paid leave.

A few words of caution. First, FAQs are not definitive and not legally binding, and even when the federal Department of Labor has issued binding COVID leave law regulations, they remain subject to court review. Indeed, a New York court recently overturned certain parts of these regulations, including the provision sanctioning healthcare providers from exempting their entire staff from coverage. Second, a careful reader of the summary descriptions above of the two laws will note differences in coverage and eligibility. Hence, federal FAQs may not correctly describe an employee's leave rights under New Jersey law. Third, because leave rights may be contingent upon whether the child care facility or educational institution closes at its option or because it is required by the government to do so, employers need to be mindful of the state's regulation of both types of organizations.

Here is a brief refresher on the federal and New Jersey laws:

Under federal law, an eligible employee may take up to 12 weeks of paid, job-protected leave during the April 2 to December 31, 2020 period for a number of COVID-related reasons, including the need to care for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, for reasons related to COVID-19; provided that no suitable person is available to care for the child during the period of such leave. An employee is eligible after 30 days of employment save for healthcare provider employees who have been excluded from coverage by the employer as well as certain employers with less than 50 employees. (Under certain limited circumstances an employee working for an employer with less than 50 employees may be exempt from coverage.)

Under New Jersey law, an eligible employee may take up to 12 weeks of job-protected leave during a 24-month period for a number of COVID-related reasons, including to provide care made necessary by reason of a state of emergency (and other similar government actions) that requires in-home care or treatment of a child due to the closure of the school or place of care of the child of the employee, by order of a public official due to the epidemic or other public health emergency. An employee is eligible after 12 months of employment, provided that s/he has at least 1,000 base hours during the preceding 12-month period.

As always, we are here for you. If you have any questions about this alert or if we can assist in any other way, please reach out.

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