Employment

(Corrections in red.)

3/19/2020

What is the Families First Coronavirus Response Act?

The Families First Coronavirus Response Act (the "Act") is a federal law that was passed by Congress on March 18, 2020, in response to COVID-19. The Act creates, among other things, Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. The Act provides payroll tax credits to employers to cover the wages paid to employees under the Act, but state and local governments are not eligible to claim these credits. The law goes into effect on ~~April 2, 2020~~ April 1, 2020, and the Department of Labor is required to issue guidelines within 15 days to assist employers in calculating the amount of emergency paid sick time.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

The Emergency Family and Medical Leave Expansion Act temporarily amends and expands the Family and Medical Leave Act until December 31, 2020, to provide paid job-protected leave to both a full-time and a part-time employee who has been employed for at least 30 calendar days ~~by an employer, including a city, with fewer than 500 employees~~. The law applies to any city regardless of size.

What is an employee entitled to?

An employee is eligible for paid leave if the employee is unable to work or telework due to a need for leave to care for the employee's child if the child's school or child care provider has been closed, or the child care provider is unavailable, due to COVID-19.

Eligible full-time employees and part-time employees are entitled to 12 weeks of job-protected leave. The first 10 days of the 12-weeks job-protected leave shall be unpaid, but an employee may elect to substitute any accrued paid time off (including vacation, personal, medical or sick leave) offered to the employee by the city for the unpaid leave. However, the employee would still be eligible for emergency paid sick leave pursuant to the Emergency Paid Sick Leave Act at two-thirds the employee's regular rate of pay that would cover the first 10 days (see explanation under Emergency Paid Sick Leave Act, below). Subsequently, a city shall provide paid leave in an amount that is not less than two-thirds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work, up to $200 per day and $10,000 in the aggregate. For part-time employees whose schedules vary from week to week such that a city is unable to determine with certainty the number of hours the employee would have worked if the employee had not taken leave, the city shall use a number equal to the average number of hours that the employee was scheduled per day over the six-month period before the employee took leave, including any leave hours that the employee may have previously taken. If the employee did not work over such time-period, the city shall use the

average number of hours of day the city, at the time of hire, reasonably expected to normally schedule the employee.

Upon expiration of the 12-week leave period, an eligible employee who took leave shall, on return from such leave, be entitled to be: (1) restored to the position the employee held when the leave commenced; or (2) restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. These requirements do not apply to a city that employs less than 25 employees if: (1) the position held by the employee when the leave commenced does not exist due to economic conditions or other changes in the operating conditions of the city that affect employment and are caused by COVID-19; (2) the city took reasonable efforts to restore the employee to an equivalent position with equivalent employment benefits; and (3) if the reasonable efforts fail, the city makes reasonable efforts to contact the employee within a one-year period (from date on which qualifying need for leave ended or the date the 12-weeks leave ends) if an equivalent position becomes available.

What notice is an eligible employee required to provide?

When the need for leave is foreseeable, an eligible employee shall provide the employer notice of leave as is practicable.

Are employees who are emergency providers exempt?

A city that employs an emergency responder may elect to not provide such employee with paid family and medical leave.

EMERGENCY PAID SICK LEAVE ACT

Who is eligible for emergency paid sick time?

A city that employs at least one employee is required to provide emergency paid sick leave to each full-time or part-time employee, regardless of how long the employee has been employed by the city, if the employee is unable to work or telework because of one or more of the following reasons, if related to COVID-19:

- The employee is subject to a federal, state, or local quarantine or isolation order;
- The employee has been advised by a health care provider to self-quarantine;
- The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- The employee is caring for an individual who is subject to a federal, state or local quarantine or isolation order or has been advised to self-quarantine;
- The employee is caring for a child of the employee if the child's school or childcare provider has been closed or the childcare provider is unavailable due to COVID-19 precautions; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Labor.

What is an employee entitled to receive?

Eligible full-time employees are entitled to 80 hours of emergency paid sick time at the employee's regular rate of pay (up to $511 per day and $5,110 in total) to self-quarantine, seek a diagnosis or preventative care, or receive treatment for COVID-19. Eligible part-time employees are entitled to emergency paid sick leave for the same reasons at their regularly rate of pay (up to $511 per day or $5,110 in total) for the number of hours equal to the number of hours that such employee works, on average, over a two-week period.

Additionally, full-time employees are entitled to 80 hours of emergency paid sick time at two-thirds the employee's regular rate of pay (up to $200 per day and $2,000 in total) to: (1) care for an individual who is subject to a quarantine or isolation order; (2) to care for a child whose school is closed or child care provider is closed or unavailable, or (3) if the person is experience any substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Labor.

Similarly, a part-time employee is entitled to emergency paid sick time for the same reasons at two-thirds of the employee's regular rate of pay (up to $200 per day and $2,000 in total) for the number of hours equal to the number of hours that such employee works, on average, over a two-week period. For part-time employees whose schedules vary from week to week, such that a city is unable to determine with certainty the number of hours the employee would have worked if the employee has not taken leave, the city shall use a number equal to the average number of hours that the employee was scheduled per day over the 6-month period before the employee took leave, including any leave hours that the employee may have previously taken. If the employee did not work over such period, the city shall use the average number of hours of day the city reasonably expected would normally be scheduled for the employee at the time of hire.

A city may not require an employee to use other paid leave provided to the employee by the city before the employee can use emergency paid sick time. Additionally, a city cannot require, as a condition of providing emergency paid sick time, that the employee needing leave search for or find a replacement employee to cover the hours during which the employee is using paid sick time. Also, emergency paid sick leave cannot be carried over from one year to the next.

What notice is required?

After the first workday, or portion thereof, an employee receives emergency paid sick time, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

Are emergency responders exempt?

The Department of Labor has the authority to issue regulations to exclude certain emergency responders from the requirement of the law, including by allowing employers of such employees to opt out.

What notice is required?

An employer is required to post and keep posted in conspicuous places on the premises of the employer where notices to employees are customarily posted. A copy of the notice to be posted should be available from the Department of Labor by March 25, 2020.

What other legal obligations apply?

An employer is prohibited from discriminating and/or retaliating against an employee who takes emergency paid sick leave, files a complaint or testifies in any proceeding to enforcing the requirements of this law. An employer who violates the provisions of the emergency paid sick leave shall be considered to have failed to pay minimum wage in violation of the Fair Labor Standards Act, and is subject to penalties. Additionally, the provisions of the paid sick leave act do not diminish the rights or benefits that an employee is entitled to under any other state or local law, collective bargaining agreement or existing employer policy.

3/25/2020

Has the Department of Labor issued guidance on the Families First Coronavirus Response Act (FFCRA)?

Yes. We reported last week that, in response to the COVID-19 pandemic, Congress adopted new legislation that expands the Family and Medical Leave Act and provides for paid emergency sick leave. Yesterday, the Department issued an initial set of questions and answers (Q&As) interpreting this legislation. Of note is that the Q&A sets the effective date of the FFRCA provisions as April 1, 2020. Although the Q&A provides additional information, many questions remain unanswered. As provided under the legislation, further guidance and implementing regulations are expected in the near future. We will continue to monitor and report back on this issue.

The Department has also indicated that they do not intend to enforce the requirements of the Act through April 17, 2020, to enable covered employers to come into compliance with the new legislation.

Has the Department of Labor released a copy of the notice that an employer is required to post?

Yes. This morning, the Department released a copy of the notice that an employer is required to post. Each city must post the notice in a conspicuous place on its premises, and may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. The Department has also issued a set of FAQs related to the notice.

How can a city participate in providing input to the Department of Labor in regard to the implementation of FFCRA?

The Department is providing an opportunity for employers, workers, and their advocacy groups to participate in a national online dialogue through Sunday, March 29, 2020. According to the

Department, "[t]his national online dialogue provides an opportunity for employers and workers to play a key role in shaping the development of the Department of Labor's compliance assistance materials and outreach strategies related to the implementation of FFCRA. The Wage and Hour Division (WHD) will use the ideas and comments gathered from this dialogue to develop compliance assistance guidance, resources and tools, as well as outreach approaches that assist employers and workers in understanding their responsibilities and rights under the paid leave provisions of the FFCRA."

Interested cities must register to participate.

3/27/2020

Has the Department of Labor issued further guidance on the Families First Coronavirus Response Act?

Last evening (Thursday, March 26), the Department of Labor issued further guidance on the FFCRA (see questions 15-37 within the guidance). The DOL's questions are printed here verbatim. Go to the guidance document for the answers.

Documentation of Leave:

-What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?
-What documents do I need to give my employer to get paid sick leave or expanded family and medical leave?
-May I take my paid sick leave or expanded family and medical leave intermittently while teleworking?
-May I take my paid sick leave intermittently while working at my usual worksite (as opposed to teleworking)?
-May I take my expanded family and medical leave intermittently while my child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, if I am not teleworking?

Work Closures, Furloughs, and Reduced Work Hours:

-If my employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can I still get paid sick leave or expanded family and medical leave?
-If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but before I go out on leave, can I still get paid sick leave and/or expanded family and medical leave?
-If my employer closes my worksite while I am on paid sick leave or expanded family and medical leave, what happens?
-If my employer is open, but furloughs me on or after April 1, 2020 (the effective date of the FFCRA), can I receive paid sick leave or expanded family and medical leave?

-If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but tells me that it will reopen at some time in the future, can I receive paid sick leave or expanded family and medical leave?
-If my employer reduces my scheduled work hours, can I use paid sick leave or expanded family and medical leave for the hours that I am no longer scheduled to work?
-May I collect unemployment insurance benefits for time in which I receive pay for paid sick leave and/or expanded family and medical leave?

Health Coverage:

-If I elect to take paid sick leave or expanded family and medical leave, must my employer continue my health coverage? If I remain on leave beyond the maximum period of expanded family and medical leave, do I have a right to keep my health coverage?

Use of Pre-existing Employer-Provided Paid Leave:

-As an employee, may I use my employer's preexisting leave entitlements and my FFCRA paid sick leave and expanded family and medical leave concurrently for the same hours?
-If I am an employer, may I supplement or adjust the pay mandated under the FFCRA with paid leave that the employee may have under my paid leave policy?
-If I am an employer, may I require an employee to supplement or adjust the pay mandated under the FFCRA with paid leave that the employee may have under my paid leave policy?
-If I want to pay my employees more than they are entitled to receive for paid sick leave or expanded family and medical leave, can I do so and claim a tax credit for the entire amount paid to them?

3/30/2020

Has the Department of Labor issued further guidance on the Families First Coronavirus Response Act?

Yes. Yesterday (Sunday, March 29), the Department of Labor issued its third round of guidance on the Families First Coronavirus Response Act (see questions 38-59 within the guidance). Go to the guidance document for the questions and answers.

4/1/2020

Has the Department of Labor issued final regulations related to the Families First Coronavirus Response Act (FFCRA)?

Yes. This afternoon, the Department issued a 124-page final rule (pending publication) implementing the emergency paid sick leave and expanded family and medical leave provisions of the FFCRA. League staff will review and provide more information in a future update.

4/2/2020

Are certain employees exempt from paid emergency sick leave and emergency family and medical leave under the Families First Coronavirus Response Act?

The Families First Coronavirus Response Act allows, but does not require, an employer to exclude an employee who is a "healthcare provider" or "emergency responder" from taking emergency paid sick leave and/or emergency family and medical leave. 29 C.F.R. §826.30(c).

The definition of an "emergency responder" is expansive and includes "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility."

Id. § 826.30(c)(2).

Similarly, a health care provider includes, among others, anyone employed at any hospital, health care center, clinic, a local health department or agency, or a facility that performs laboratory or medical testing. *Id.* § 826.30(c)(1). Additionally, the governor and the mayor, as the highest officials of their territories, may, as applicable, determine other categories of emergency responders and health care providers, as necessary.

As mentioned above, a city is not required to exclude an otherwise eligible health care provider or emergency responder from taking emergency paid sick leave or emergency family and medical leave. The Department of Labor notes that "the authority for employers to exempt emergency responders is reflective of a balance struck by the FFCRA . . . [to] provide[] for paid sick leave and expanded family and medical leave so employees will not be forced to choose between their paychecks and the individual and public health measures necessary to combat COVID-19 . . . [and that] providing paid sick leave or expanded family and medical leave does not come at the expense of fully staffing the necessary functions of society, including the functions of emergency responders."

A city that chooses to exclude otherwise eligible healthcare providers and/or emergency responders from taking leave under the FFCRA, must act affirmatively to do so. A city's exercise of this option does not impact the employee's earned or accrued sick, personal, vacation or other employer-provided leave under the city's established policies. Additionally, a city may not prevent an employee who is a health care provider or emergency responder from taking accrued leave in accordance with established policies.

4/3/2020

What notice and documentation must an employee provide in support of leave under the Families First Coronavirus Response Act?

An employee is required to provide notice of leave only after the first workday (or portion thereof) for which the employee takes emergency paid sick leave or emergency family and medical leave. 29 C.F.R. §826.90(b). A city may adopt reasonable notice procedures for an employee to follow, after the first workday (or portion thereof), including requiring oral notice and sufficient information for an employer to determine whether the requested leave is covered; requiring the employee comply with the city's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances; and allowing an employee's spouse, adult family member or other responsible party to provide notice to the city if the employee is unavailable. Id. §§826.90(a), (b), (c). A city may encourage, but not require, that an employee provide notice of leave in advance or as soon as practicable (except that an employee who is taking leave to care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 reasons, must provide notice of such leave as soon as practicable if the need for said leave was foreseeable). Id. §826.90(a). If an employee fails to provide the proper notice, the city should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave. Id.

An employee is required to provide the city documentation in support of emergency paid sick leave or emergency family and medical leave. Such documentation must include a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement that the employee is unable to work or telework because of the COVID-19 qualifying reason. Id. §826.100(a). An employee is required to provide additional documentation depending on the type of COVID-19 qualifying reason for leave. An employee requesting emergency paid sick leave because the employee is subject to a government quarantine or isolation order must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject. Id. §826.100(b). An employee requesting emergency paid sick leave to self-quarantine upon the advise of a health care provider must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons. Id. §826.100(c). An employee requesting paid sick leave to care for an individual must provide either the name of: (1) the government entity that issued the quarantine or isolation order to which the individual is subject; or (2) the name of the health care provider who advised the individual to self-quarantine, as applicable. Id. §826.100(d). An employee requesting to take emergency paid sick leave or emergency family and medical leave to care for his or her child must provide the following information: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave. Id. §826.100(e).

An employer is required to retain all documentation provided pursuant to a request for leave for four years, regardless of whether leave was granted or denied. If an employee provided oral statements to support his or her request for paid sick leave or expanded family and medical

leave, the employer is required to document and retain such information for four years. Id. §826.140.

For leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply. See 29 CFR 825.306.

May an employee take emergency paid sick leave and/or emergency family and medical leave intermittently?

A city may, but is not required to, allow an employee who teleworks to take emergency paid sick leave and/or emergency family and medical leave intermittently (i.e. in separate periods of time, rather than one continuous period). Id. §826.50(c). Similarly, an employee who reports to a work-site may, with the city's permission, take such leave intermittently only if the leave is to care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons. Id. §826.50(b)(1). The agreement to allow an employee to take leave intermittently need not be in writing, but there must be a clear and mutual understanding that the employee may take the leave intermittently. Id. §826.50(a). Additionally, both the city and the employee must agree on the increments in time in which leave may be taken.

In contrast, an employee who reports to a work-site is prohibited from taking emergency paid sick leave intermittently, notwithstanding any agreement between the city and the employee, if the leave is taken because the employee: (1) is subject to a federal, state or local quarantine or isolation order related to COVID-19; (2) has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) is caring for an individual who is subject to an order described in (1), above, or has been advised as described in (2), above; or (4) is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services. Id. §826.50(b)(2). Once such employee begins taking emergency paid sick leave for one or more of the reasons set forth above, they must use the leave continuously until either the employee uses the full amount of leave or no longer has a qualifying reason for taking the leave. Id. The Department of Labor has determined that in these instances, taking intermittent leave poses an unacceptably high-risk that the employee might spread COVID-19 to other employees when reporting to the employee's worksite.

4/6/2020

Has the Department of Labor issued additional guidance on the implementation of the Families First Coronavirus Response Act?

Following its publication of a final rule implementing the FFCRA, the Department issued, on Friday April 3, additional guidance (questions 60-79) that provides - among others - answers to the following questions: (1) what is a "place of care" and a "child care provider; (2) can an employee take paid emergency sick leave to care for someone else's child; (3) how to calculate

the pay for seasonal employees with irregular schedules; and (4) how the FFCRA interplays with workers' compensation and short-term disability.

Additionally, the Department has prepared a webinar that can be accessed here (also see webinar slides) which provides a general overview of the FFCRA.

Has the Equal Employment Opportunity Commission issued guidance on the interaction between the Americans with Disabilities Act and COVID-19?

Yes. The EEOC recently updated its guidance on pandemic preparedness in the workplace and the ADA to address its application to COVID-19. The guidance addresses, among other things, the following questions:

-How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?
-When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?
-Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?
-When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?
-If an employer is hiring, may it screen applicants for symptoms of COVID-19?
-May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?
-May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?
-May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?

4/9/2020

Are city employees entitled to hazard pay?

Hazard pay for city employees is not mandated by state or federal law. State law requires state agencies to pay its eligible state employees hazard duty pay. Tex. Gov't Code §659.302. But no similar law requires a city to provide hazard pay to its employees. A city can choose to do so by enacting a policy allowing for such pay. Additionally, city personnel should review their emergency management plan to determine if and under what conditions hazard pay is authorized.

What is a furlough?

The term "furlough" does not have an exact legal definition, but it is generally understood to mean mandatory unpaid time off from work for a certain time period that is limited in duration. A reduction in pay alone, without any corresponding unpaid time off, is not typically considered to be a furlough. Employers typically use furloughs in times of significant economic downturns that are temporary in nature as an alternative to terminating or laying off employees or

implementing across-the-board pay cuts. A furlough can be accomplished in a number of ways, including by reducing – for a certain time period – the number of hours or days an employee works with an equivalent reduction in pay or requiring an employee to take a certain amount of unpaid time off. A furlough may include all employees or may exclude some employees, such as employees who provide or support essential or critical services. Additionally, unlike a termination or a layoff in which there is a separation of the employment relationship, a furloughed employee is still considered to be an employee.

A city that is considering a furlough for all or some of its employees should work with local counsel to develop a policy that addresses, among other things, which employees will be subject to a furlough, who approves furloughs, how long a furlough will be in place, and what benefits, if any, an employee will continue to accrue during a furlough. A city should also review any contractual requirements, including any meet and confer agreements and collective bargaining agreements, before taking action to furlough employees who are subject to those agreements.

May a city furlough exempt and non-exempt employees?

Absent any contractual obligations, a city may furlough both exempt and non-exempt employees. Because an employer is only required to pay for the hours a non-exempt employee actually works, a city may reduce the number of hours a non-exempt employee is scheduled to work provided that the employee is paid at least the minimum wage ($7.25/hour) for all hours worked and any applicable overtime pay.

Generally, under the Fair Labor Standards Act (FLSA), certain exempt employees (executive, professional, administrative, and certain computer employees) must be paid a "predetermined salary" (a minimum of $684/week) for any workweek in which the employee works without regard to the quantity or quality of work. Failure to do so generally results in the exempt employee losing his or her exempt status. However, a special rule applicable only to public sector employers, including a city, allows for an exempt employee to retain his or her exempt status except in the workweek when furlough is taken and the employee's salary is reduced accordingly. See 29 C.F.R. §541.710. This provision allows an exempt employee to take furlough in less than full workweeks. For example, an exempt employee can take every Tuesday (8 hours) as a furlough day, and the city is only required to compensate the employee for 32 hours worked during that workweek. During such workweek, the employee is treated as a non-exempt employee, is paid on an hourly basis, and is entitled to overtime pay if the employee works more than 40 hours in that workweek. Cities should ensure that in a workweek when furlough is taken, the combination of worked hours and furlough hours do not exceed 40 hours, otherwise the employee will be entitled to overtime. As such, most furlough policies prohibit an employee from performing any work on the day(s) when the employee is on furlough, including tasks such as checking or responding to emails or voicemails, answering phone calls, or attending meetings.

Cities that are contemplating a furlough may want to review the Department of Labor Fact Sheet #70, which provides additional information on wages issues that may come up during a furlough.

Can an employee use his or her paid accrued time off to supplement the employee's pay during a furlough?

Yes, but only if a local policy allows for it. Some policies require or allow an employee to use his or her accrued paid time in lieu of a furlough. Others prohibit an employee from using any accrued time off to supplement pay during a furlough. Cities should carefully consider these options when drafting a furlough policy taking into account the city's budget.

Is an employee's health insurance coverage impacted during a furlough?

Whether an employee (and any dependents of the employee) who is on furlough will be eligible for continued group health insurance benefits with the city will depend on whether the health benefit plan documents allow benefits to continue when an employee fails to work the required number of hours specified in the plan documents. Some health benefit plans require that an employee work a specific number of hours (for example, 20 hours) in order to be eligible for health care benefits. A city considering a furlough should review the plan documents and any stop-loss policy to determine how coverage is affected during a furlough. If it is determined that continued coverage is unavailable for furloughed employees, a city may reach out to its health insurance carrier to determine if a waiver of any work hour threshold requirements is available for employees whose work hours are reduced as a result of a furlough. Cities who are members of TML Health should note that TML Health has temporarily waived its actively-at-work eligibility requirements until May 31, 2020, for employees whose hours are temporarily reduced due to COVID-19, provided certain conditions are met.

The loss of health care benefits that results from a temporary reduction in the number of hours worked due to a mandatory furlough is a qualifying event that triggers the Consolidated Omnibus Budget Reconciliation Act (COBRA). A city that employs 20 or more employees and that offers health plan coverage must follow COBRA requirements, including providing COBRA election notices to employees (and their eligible dependents) who have a qualifying event. The employee may elect to continue health coverage at the employee's own expense, but a city also has the option of assisting its employees by paying a portion of the COBRA premiums. COBRA requirements apply even if the employee is furloughed for a short-time period such as a month.

Keep in mind that an employee who takes leave under the Family and Medical Leave Act (FMLA) or who takes emergency family and medical leave and emergency paid sick leave under the Families First Coronavirus Response Act (FFCRA) is entitled to continued group health coverage under the city's group health plan on the same terms as if the employee did not take leave.

Does an employee continue to accrue leave benefits (e.g. sick, vacation, personal time off) during a furlough?

There is no legal requirement for such employer-provided benefits to accrue during a furlough, unless otherwise provided in a local policy. For purposes of the FMLA and emergency family and medical leave under the FFCRA, any benefits that would be maintained while the employee is on other forms of leave (including paid leave if the employee substitutes accrued paid leave

during FMLA leave) must be maintained while the employee is on FMLA leave or emergency family and medical leave.

May an employee scheduled to take Family and Medical Leave Act (FMLA) or Families First Coronavirus Relief Act (FFCRA) leave be furloughed?

Yes. However, no days associated with the furlough should count against the FMLA or FFCRA leave entitlement. Also, the request for FMLA leave cannot be used as a selection reason to decide who gets furloughed.

Is an employee who is placed on furlough able to collect unemployment insurance benefits?

An employee whose hours are reduced due to a mandatory furlough may be eligible for partial unemployment benefits. Such employees should contact the Texas Workforce Commission to determine eligibility. Additionally, the Commission is encouraging employers, as an alternative to layoffs, to participate in the voluntary Shared Work program, which allows employers to supplement their employees' wages that are lost because of a reduction in work hours with partial unemployment benefits if certain conditions are met.

4/10/2020

Has the EEOC provided additional guidance on Equal Employment Opportunity (EEO) laws?

Yes. On April 6, we reported that the EEOC had provided guidance that focused on the application of the Americans with Disabilities Act (ADA) during a pandemic. Yesterday, April 9, the EEOC published Q&As addressing the application of other equal employment opportunity laws and updating its guidance on the ADA. The Q&As specifically address disability-related inquiries and medical exams; confidentiality of medical information; hiring and onboarding; reasonable accommodations; and harassment on the basis of national origin, race, and other protected classes.

Additionally, the EEOC has created a webpage that provides COVID-19 resources in the employment context, including a pre-recorded webinar addressing frequently asked questions on EEO laws and COVID-19.

4/20/2020

Has the Department of Labor provided guidance on the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

Yes. The Department issued a fact sheet reminding employers of the federal right to employment and reemployment for members of the National Guard or Reserves who are called to active duty in response to the COVID-19 pandemic. Specifically, the Department provides that an employer may not delay a service member's reemployment out of concern that the service member's service in a COVID-19 affected area may have affected him or her to COVID-

19. If the employee satisfies the prerequisites to reemployment, the employee should be promptly reemployed in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. Promptness generally depends on the length of time an individual was away, ranging from the next day after returning from duty, if the deployment was relatively short, to up to fourteen days in the case of a multi-year deployment. When reemploying a service member who might have been exposed to COVID-19, an employer must make reasonable efforts in order to qualify the returning employee for his or her proper reemployment position. This can include temporarily providing paid leave, remote work, or another position during a period of quarantine for an exposed reemployed service member or COVID-19 infected reemployed service member, before reemploying the individual into his or her proper reemployment position.

While service in the Texas state military forces is not considered "service in the uniformed services" under USERRA, state law provides that individuals serving in the state military forces have the same protections in employment, reemployment, and retention in employment as provided by USERRA. Tex. Gov't Code §431.202(d). This provision is limited to cities with five or more employees.

Does state law provide for paid time off for members of the Texas state military?

Yes. An employee of a city who is a member of the Texas military forces, a reserve component of the armed forces, or a member of a state or federally authorized urban search and rescue team is entitled to a paid leave of absence of up to 15 working days in a fiscal year for authorized training or duty. Tex. Gov't Code §437.202(a). These individuals must be paid and cannot be subject to lost time, loss of an efficiency rating, or a loss of vacation, personal, or sick leave. Id.

Has the EEOC provided further guidance on the Americans with Disabilities Act as it relates to COVID-19?

Yes. On April 17, the EEOC provided additional guidance specifically addressing requests for reasonable accommodations and guidance on ADA compliance when employees return to work during the pandemic. With respect to reasonable accommodations, the guidance provides, among other things that:

-An employer may ask employees with disabilities to request accommodations that they believe they may need in the future when the workplace re-opens.

-If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, an employer may provide a temporary accommodation. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change, including short-term accommodations. Employers may wish to adapt the interactive process – and devise end dates for the accommodation – to suit changing circumstances based on public health directives. Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government

restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts the employee at greater risk during this pandemic. This could also apply to employees who have disabilities, such as a mental illness or disorder, exacerbated by the pandemic. Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

-An employer does not have to provide a particular reasonable accommodation if it poses undue hardship (i.e. "significant difficulty or expense"). However, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

-Additionally, prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

With respect to returning to work, an employer may:

-Make disability-related inquiries and conduct medical exams if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety. Direct threat is to be determined based on the best available objective medical evidence such as guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time. For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) of all those entering the workplace. Similarly, the CDC recently posted information on return by certain types of critical workers. Employers should make sure

not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

-An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example regular hand washing and social distancing protocols). However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if doing so is feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.