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Pandemic Pandemonium (Summer Vacation Edition): How the Governor's Latest Executive Order Complicates FFCRA Leave for Employers

Working Together

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NOTE: Please see the* Working Together *post dated July 24, 2020, for the most current information on this issue.

UPDATED: This post has been updated to reflect guidance issued on July 14th removing Delaware and adding Minnesota, New Mexico, Ohio, and Wisconsin to the list of states meeting the criteria described in the Governor's Executive Order.

As if COVID-19 had not already caused enough headaches for employers, its latest painful consequence might be its impact on your employees' summer vacations. Last week, Governor Lamont issued Executive Order No. 7BBB, instructing all travelers entering Connecticut from states experiencing high rates of COVID-19 infection to self-quarantine in accordance with CDC guidance.

Effective as of 11:59 p.m. on Wednesday, June 24, 2020 (the date of the Order), travelers who enter Connecticut from a state with a daily positive COVID-19 test rate higher than 10 per 100,000 residents, or higher than 10% test positivity rate over a seven-day rolling average, are directed to self-quarantine for 14 days. In an effort to aid travelers in complying with the Executive Order, the State of Connecticut released a list of COVID "hot spots" meeting the Executive Order's criteria, which will be updated regularly and can be found here. Given the fluidity and unpredictability of the pandemic's spread nationwide, the list of states subject to this restriction is likely to evolve in the coming weeks.

The most recent (i.e., July 14) version of the list subjects travelers from 22 states to the 14-day quarantine, including Alabama, Arkansas, Arizona, California, Florida, Georgia, Iowa, Idaho, Kansas, Louisiana, Minnesota, Mississippi, North Carolina, New Mexico, Nevada, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Wisconsin. Importantly, the requirement applies to Connecticut residents returning from the listed states, as well as to residents of those states who are visiting Connecticut.

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What Does This Mean for Employers?

While these restrictions certainly complicate travel and vacation plans for employees, the Governor's Executive Order also raises a number of concerns for employers.

As of April 1, 2020, the Families First Coronavirus Response Act (the "FFCRA" or the "Act") requires most employers to provide employees with two weeks of emergency paid sick leave for certain COVID-19-related qualifying conditions, and up to 12 weeks of paid expanded family and medical leave for employees who are unable to work because they must provide care for a child under 18 whose school, day care, or summer camp has closed because of COVID-19. While many employers have already been faced with administrative challenges associated with these leave requirements (including keeping up with the rapidly evolving guidance), these new travel restrictions muddy the waters even further.

Under the paid sick leave provisions of the FFCRA, an employee may be eligible for leave if the employee is "unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis." Regulations issued by the US Department of Labor (the "DOL") explain that such orders include "quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order." Based on this expansive definition, the Governor's Executive Order directing travelers entering Connecticut to quarantine for 14 days likely qualifies as a quarantine or isolation order under the FFCRA.

While this appears to be yet another COVID-19 headache for employers, there may be a dose of ibuprofen hidden in plain sight. According to the DOL, when determining if an employee is eligible for paid sick leave under the FFCRA, the question is whether the employee would be able to **work or telework** "but for" being required to comply with a quarantine or isolation order.

Put differently, an employee may not take paid sick leave if his or her employer "permits the employee to perform work from the location where the employee is being quarantined or isolated... For example, if a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer's computer."

Of course, the availability and practicality of remote work will differ between employees and will be impacted by the nature of the business, the employee's job duties and responsibilities, and overall business necessity. It may be unfeasible to provide remote work for employees whose job duties require their physical presence in the workplace, but employers should evaluate each situation on an individual basis and make

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determinations about leave based on the facts and circumstances involved. (Some comfort may also be taken from the fact that the emergency paid sick leave under the FFCRA is funded through a tax credit.) Employers should be prepared to respond to requests for paid sick leave from employees returning from affected states, and should proactively develop protocols to address unanticipated staffing shortages (including requiring that employees notify management **prior** to travel.) It is recommended that organizations periodically review their COVID-19 workplace policies as much of the state and federal guidance has changed recently.

Employers should be mindful of the complexities involved with returning employees to performing their duties in the workplace and should consult counsel as issues arise to ensure full compliance with the confusing web of laws, regulations, and guidance. Failing to comply with these requirements, even accidentally, could result in significant liability for your organization. The lawyers at Pullman & Comley are dedicated to assisting employers in ensuring compliance with these and other COVID-19 related requirements, and we have policy templates and other useful resources available. Please contact any of our Labor and Employment Law attorneys if you have any questions.

Posted in COVID-19, Executive Order, Leave

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