

Montana Nonprofit Association

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FFCRA/CARES ACT Updates

- ★ **Federal State UI Agreement was signed April 4th**
 - Backlogged claims and bonus checks should flow soon (as soon as this week for approved claims, longer for those eligible under new federal programs)
 - Certain UI provisions of the CARES Act allow COVID-19 for weeks of unemployment that start after January 27, 2020.
 - SBA has issued rule for PPP loans
- ★ **IRS has issued Q&As on deferral of payroll tax deposits**
- ★ **Clarification of Documentation supporting FFCRA Leaves**

Hot of the Presses

- ★ The first federal CARES Act UI program payments were scheduled for processing yesterday, April 13th, 2020
 - The \$600 is added to the weekly benefit amount an individual receives.
 - Claimants do not need to do anything to receive this extra funding.
 - It doesn't matter how small the underlying benefit payment is. Anything over \$1 is topped off with another \$600.
 - This \$600 is retroactive to the week beginning 3/27 and ending 4/4, not before.
 - Separate payments will be issued mid-week to cover the retroactive \$ 600 for those who received benefits last week.

Hot of the Presses

★ Additionally:

- The \$600 extra payments continue through the week ending July 25, 2020.
- Work search issues are suppressed as of April 5, 2020.
- Since March 15, over \$27.2 million in benefits have been paid to eligible Montanans.
- Last week alone, \$ 11.7 million was paid out.

Payroll Tax Deferrals

- ★ Employers may defer the deposit and payment of the employer's portion of social security taxes.
 - Employers that received a Paycheck Protection Program loan may not defer the deposit and payment of the employer's share of social security tax that is otherwise due after the employer receives a decision from the lender that the loan was forgiven.
 - The deferral applies to deposits and payments of the employer's share of social security tax March 27, 2020, and ending December 31, 2020. (Section 2302 of the CARES Act calls this period the "payroll tax deferral period.")

Payroll Tax Deferrals

- ★ The Form 941, Employer's QUARTERLY Federal Tax Return, will be revised for the 2nd Qtr of 2020.
 - All employers may defer the deposit and payment of the employer's share of social security tax for period after 3/29/20.
 - Employers may defer the employer's share of social security tax due on or after the date that the PPP loan until forgiven
 - Once a PPP loan is forgiven, the employer is no longer eligible to defer deposit and payment of the employer's share of social security tax due after that date.

Payroll Tax Deferrals

- ★ The ability to defer tax deposits applies to all employers, not just employers entitled to paid leave credits and employee retention credits.
 - On December 31, 2021, 50 percent of the deferred amount is due;
 - On December 31, 2022, the remaining amount.
 - Self-employed individuals may also defer self-employment tax

FFCRA Documentation

- ★ Employers are required to maintain the following records for each FFCRA leave:
 - The name of the employee taking leave;
 - The date(s) for which leave is requested and provided;
 - A statement from the employee of the FFCRA eligible reason for which leave is taken, with the information shown following:

Quarantine Documentation

- ★ If the employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, the employee must provide:
 - the name of the healthcare provider who advised the employee to self-quarantine.
 - If the employee is experiencing symptoms of COVID-19 and seeking medical diagnosis, then that statement is sufficient (no other documentation needed).

Quarantine Documentation

- ★ If the employee is her/himself subject to a federal, state, or local quarantine or isolation order related to COVID-19, the employee must provide:
 - the name of the government entity that issued the order.

Caring For Individuals Documentation

- ★ If the employee is caring for an individual who is subject to a quarantine order or has been advised to self quarantine, the employee must provide:
 - the name of the individual for whom the employee is caring,
 - the employee's relationship to that individual, and
 - the name of the government entity or healthcare provider that required the quarantine.

School Closure Documentation

- ★ If the employee is caring for a child due to a school or care center closure, or unavailability, the employee must
 - provide the name and ages of their children;
 - the name of the school, care center, or care provider that is unavailable for COVID-19 related reasons; and
 - a representation that no other person will be providing care for the child during the period for which the employee is receiving EFMLEA.
 - To the extent the children for whom the employee is caring for are over the age of 14, the employee must also state that special circumstances exist requiring the employee to provide care.

Documentation

- ★ Employers should limit their inquiry into the employee's reasons for FFCRA leave to the above documentation.
 - The FFCRA regulations make clear that employers cannot require additional documentation of an employee's reason for leave, aside from what is listed above and any further guidance issued by the IRS or DOL

Credit Documentation

- ★ Additionally, employers must collect and retain the following information from their own records, for each provided FFCRA leave:
 - Documentation showing how the employer determined the amount of qualified sick and family leave wages paid to employees, including records of work, telework, and qualified sick leave and qualified family leave.
 - Documents used to determine the employee's regular hours per week;
 - Documents used to determine the employee's regular rate.
 - Documentation showing how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.

Payroll Documentation

- ★ If possible, employers are advised to establish separate pay codes for FFCRA leave entitlements, to assist in the clear tracking of leave and ensure tax credit calculations are correct.
 - Employers should then retain this information, along with the employee's completed certification form, in a leave file specific to the individual employee.
 - Employers do not need to provide this documentation to the IRS when seeking the tax credit, but must maintain it in their records for at least four years following the date when the tax becomes due or is paid, whichever is later.

Other Labor Issues That Can Arise

- ★ Claims of Wrongful Discharge or Discrimination During Layoffs
- ★ Claims of retaliation against employees using leave rights under FFCRA or USERRA
- ★ Indemnification Costs Related to Teleworking
- ★ Claims related to Wage & Hour Law

The Importance of Documentation

- ★ Documentation supporting the choice of one worker over another can be critical in withstanding claims of wrongful discharge or discrimination
 - The McDonald Douglas shifting burdens test
- ★ Legitimate layoffs usually supersede reemployment rights in cases of military leave, pregnancy and ADA

Wrongful Discharge Claims

- ★ The Wrongful Discharge From Employment Act covers layoffs and recalls as well as terminations.
- ★ Three causes of action:
 - Public Policy Violations
 - Written Policy Violations
 - Good Cause Violations for non-probationary employees
- ★ Claims during layoffs can arise based on allegations employer did not follow its layoff or recall policies
- ★ The importance of Grievance Procedures
- ★ Statute of Limitations

Discrimination

- ★ National Origin discrimination against Asians in retaliation for virus origination
- ★ Adverse Impact Claims
 - The effect of an actions disproportionately affects an affected class
 - OWBPA protects older workers in layoffs
- ★ Montana specific discrimination rules
 - Small employers covered
 - Marital status
 - All ages

COVID Inquiries

- ★ During a pandemic, ADA-covered employers may ask employees if they are experiencing symptoms of the pandemic virus.
 - For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat.
- ★ Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Doctor's Notes

- ★ The ADA allows employers to require a doctor's note certifying fitness for duty are permitted under the ADA
 - As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.
 - EEOC recommends employers consider allowing new approaches such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

Sending Sick Employees Home

- ★ The ADA allows employers to require employees to stay home if they have symptoms of the COVID-19 since the CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace.
- ★ The ADA does not interfere with employers following this advice.

Body Temperature

- ★ Employers may take the body temperature of employees during the COVID-19 pandemic
 - Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

Medical Recordkeeping

- ★ Remember, the ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information.
 - An employer may store all medical information related to COVID-19 in existing medical files.
 - This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

Severance Agreements

- ★ Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer.
 - More information is available in EEOC's technical assistance document on severance agreements.
 - If employee is over 40, 21 day signing period with 7 day revocation period applies.

Retaliation

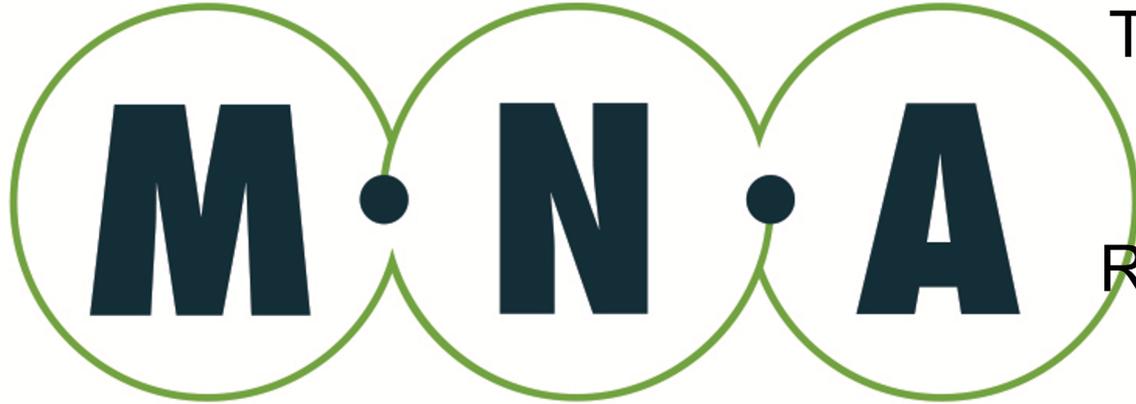
- ★ A change in duties, compensation, terms or conditions of employment can trigger retaliation claims
- ★ Six month rule
- ★ The “but-for” argument

Wage and Hour Claims

- ★ **Misclassification as Exempt**
 - The pressure of laying off staff may create a temptation to misclassify individuals as exempt to provide needed labor to the employer.
- ★ **Improper Calculation of Regular Rate of Pay**
 - Regular rate is all money paid to an employee except for seven listed types of payments.
- ★ **Employers are required to indemnify employees for costs associated with work**

Time Worked Issues

- ★ Telework and budget pressures can lead to working time not being fully compensated:
 - Suffered or permitted to work
 - No volunteering if already employed in any capacity
 - Recording time actually worked
 - Breaks and meal periods
- ★ Overtime is not required for work in excess of scheduled hours nor for time over 8 hrs or 6th or 7th workday.



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