

MEMORANDUM

DATE: October 19, 2020

RE: COVID-19 Updates for Employers

We are eight months into the COVID-19 pandemic, with no apparent relief in sight. In the meantime, the Department of Labor recently updated its regulations affecting the FFCRA paid leave programs (EPSLA and EFMLA); Oregon adopted a new, temporary COVID paid leave program for employees who are not eligible for the federal EPSLA/EFMLA programs; and OR-OSHA issued a new regulation that goes into effect on November 1, 2020, mandating that Oregon employers adopt additional workplace safety measures.

Below is a summary of each of those developments.

Updated DOL COVID-19 RegulationsDefinition of Health-Care Provider

For purposes of the EPSLA and EFMLA, the DOL's revised regulations narrow the definition of "health care providers" who can be denied leave under the law.

Under the original rules, the definition of "health care provider" was interpreted very broadly to include nearly all employees of a health care employer. However, under the new rule, "health care providers" are limited to (a) emergency responders; (b) employees the FMLA defines as health care providers; and (c) those who are employed to provide diagnostic, preventative or treatment services, or other services that are integrated with and necessary for the provision of patient care. Thus, it is no longer enough that the employee works for an employer who provides health care services. Instead, you need to look at the specific health care-related services provided by the employee. Under the new rule, eligible employees would include physicians; nurses; nurse assistants; and technicians and others who take, process or interpret test results necessary for diagnosis and treatment such as X-rays, MRIs and lab tests.

As a reminder to employers who are also subject to the Oregon Family Leave Act (OFLA), because the State of Oregon amended the OFLA to include parents who are missing work because their kids are not able to attend school due to COVID-19, even if you exclude the health care provider from the EPSLA and/or EFMLA, that employee may still be entitled to remain home under the OFLA. Although the employee's absence would be unpaid, it would still be protected. So employers who exclude their health care providers from EPSLA/EFMLA entitlement need to proceed with care to ensure that the employee is not denied any other protected leave.

Timing of Necessary Documentation

Previously, employees were supposed to provide the necessary documentation before the leave began. Under the new rule, employees must provide any required documentation as soon as practicable, which typically means when the employee requests the leave.

Oregon COVID-19 Temporary Paid Leave Program

In July, the Oregon Legislature established a \$30 million COVID-19 Temporary Paid Leave Program. The program provides a \$120 per-day payment for up to 10 working days to employees who need to quarantine/isolate due to COVID-19 exposure or symptoms, but do not qualify for paid sick leave under the federal Families First Coronavirus Relief Act (for example, because their employer is exempt from the FFCRA, or because the employee exhausted or does not have access to COVID-19-related paid time off). The program started on September 16, 2020 and ends once the funds run out, or by December 31, 2020, whichever occurs first. If you or your employees have questions about how the program works, the Department of Consumer Business Services offers detailed and helpful guidance [here](#).

Important New OR-OSHA COVID-19 Rule

Among other requirements, Oregon employers are obligated to maintain a safe workplace. OR-OSHA recently published a [rule](#) that specifies what that means with respect to COVID-19. The rule, which goes into effect on November 1, imposes several important requirements on employers. We've summarized the rule in this email, but every employer should review it in its entirety:

Requirements for All Workplaces

All workplaces must adopt the following protocols:

Exposure Risk Assessment

- No later than November 21, all employers must conduct a COVID-19 exposure risk analysis to assess potential employee exposure to COVID-19 in the workplace. That assessment must answer 12 specific questions set forth in the rule.
- The employer must obtain feedback and participation from employees via safety meetings, safety committees, the distancing officer or a supervisor, or any other similarly interactive process.
- Employers with more than ten employees statewide (including temporary and part-time workers) and “exceptional risk” employers must record their COVID-19 exposure risk assessment in writing, and include additional information specified in the rule.

Masks (all references to “masks” include face coverings and face shields)

- Employers must reconfigure workspaces to ensure a 6-foot physical distance between employees, both inside and outside.
- If 6-foot distancing is not possible, all individuals (including employees, customers and vendors) over five years-old must wear masks at all times (except when actively eating, drinking or smoking).
- In indoor work spaces with less than 35 square feet per individual, masks must be worn at all times, even if social distancing is possible.
- If two or more employees are working in a room with less than 200 square feet, masks must be worn at all times, even if social distancing is possible.
- Employers must provide masks, face shields or face coverings for employees at no cost. Employers may permit employees to use their own masks, but are not obligated to.
- When employees are using vehicles for work-related travel, vehicle capacity is limited to the greater of two individuals or one-half the vehicle’s legal capacity, whichever is greater. Masks must be worn at all times, regardless of trip duration or distance.

Sanitation

- Employers must clean all common areas, shared equipment and high-touch surfaces within 24 hours of use.
- Employers must provide employees with supplies necessary to sanitize more frequently and perform hand hygiene before using shared equipment, applying cosmetics, eating, or smoking.

Distancing Officer

- All employers must designate at least one individual or employee per establishment who will be responsible for assisting the employer in implementing the employer’s workplace policies related to physical distancing; mask use; and COVID-19 sanitation procedures. The employer may designate itself as the distancing officer for an establishment.

Infection Notification and Testing

- Employers must establish a mechanism for notifying affected employees within 48-hours of the employer being made aware of the positive test result that an individual with COVID-19 was present in the workplace or otherwise may have had contact with its worker(s).
- Whenever the Oregon Health Authority or a Local Public Health Authority indicates that testing within the workplace is necessary, employers must cooperate by making employees and appropriate space available at no cost to the employees. However, unless the employer requires a test the employer is not required to cover the cost of the actual test or of any travel related to the test.

Reassignment

- Whenever the Oregon Health Authority or local public health agency or medical provider recommends employee quarantine or isolation due to COVID-19, the affected worker(s) is entitled to work from home or away from other employees whenever feasible, and is entitled to job restoration when the isolation period ends.

Postings

- Employers must post the “COVID-19 Hazards Poster” provided by OR-OSHA in a central location where workers can be expected to see it. Employees working remotely must be provided the same information through electronic or equally effective means.
- Employers must also post the “COVID-19 Hazards Poster” in a conspicuous manner in the following areas:
 - Any points of entry into an indoor portion of the workplace;
 - Any points of entry into a bathroom, whether a single occupant or multi-occupant bathroom with multiple stalls or urinals, that is used by employees or other individuals at the workplace; and
 - Any points of entry or similarly conspicuous area within lunchrooms, breakrooms, or other areas designated by the employer that workers eat or smoke.

Additional Requirements for Health Care Workplaces

The rules imposes additional requirements on employers who provide direct patient care, including medical and dental practices, hospitals, first responders, decontamination services and tissue laboratories. Employers in those industries are advised to carefully review those additional rules.

For more information, please contact our Labor and Employment attorneys, Amanda Walkup, Andy Lewis and Mario Conte.

This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.