Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

September 2020

OHIO HB 606 PROVIDES IMMUNITY FOR EMPLOYERS

On September 14, 2020, Governor Mike DeWine signed House Bill 606. HB 606 temporarily provides legal immunity from coronavirus-related lawsuits to businesses, health-care workers, and schools. HB 606 will take effect December 13, 2020, however the limited immunity will apply to actions arising between the date of the Governor's Executive Order 2020-01D, issued March 9, 2020, through September 30, 2021.
The purpose of HB 606 is to maintain consistency with the Governor's previous goals of protecting Ohioans from the virus while attempting to protect the local economy. The novel aspect of the coronavirus and the evolving methods of treatment and containment have created a concern of increased litigation resulting from a health care provider, business or school from unknowingly spreading the virus.

HB 606 provides immunity from tort liability and professional discipline to specified health care providers for services provided during a disaster or emergency that result in injury, death or loss allegedly resulting the action, omission or decision in the provision, withholding or withdrawal of those services. Further, HB 606 grants immunity when the services follow an executive order or director order. Additionally, HB 606 grants immunity from tort liability and professional discipline when a health care worker was unable to treat a person due to the inability to perform an elective procedure due to an executive, director, or local health department order in relation to an epidemic or pandemic. However, the tort immunity does specifically exclude conduct that constitutes a reckless disregard of the consequences or intentional or willful or wanton misconduct. The immunity from professional disciplinary action excludes conduct that constitutes gross negligence. It should be noted that the immunity does not create a new cause of action or substantive legal right against a health care provider or affect an immunities or responsibilities of a health care provider. Further, if the immunity does not apply, no class action can be brought against a health care provider for the conduct undertaken during a disaster or emergency.

HB 606 also generally prevents bringing a civil action for injury death, or loss to person or property against any person if the cause of action is based wholly or in part to the exposure or transmission or contraction of various coronaviruses or their mutations. Of note, the definition of "person" in this section includes a school, a for-profit or nonprofit entity, a governmental entity, a religious entity or a state institution of higher education. However, this immunity does not apply if it is established that the exposure to or the transmission or contraction of any of the viruses or mutations was by reckless conduct, intentional misconduct, willful or wanton misconduct of the person against whom the action is brought. Similar to the provisions regarding health care providers, if the general immunity does not apply, no class action can be brought against any person alleging liability for damages for injury, death, or loss to person or property based on the specified cause of action. Further HB 606 states that a government order, recommendation or guideline does not create a duty of care on a person that may be enforced in a cause of action or that may create a new cause of action or substantive right against any person regarding the matters in the government order recommendation or guideline.

It should also be noted that prior versions of HB 606 included a presumption for health care workers that contracted COVID-19 as an occupational disease in a workers' compensation claim. This provision was removed, so claims for an injury or occupational disease related to virus exposure remain unchanged.

Department of Labor Issues Revised FFCRA Regulations

On September 11, 2020, the Department of Labor (DOL) issued revised regulations under the Families First Coronavirus Response Act (FFCRA). Generally, the FFCRA requires employers with fewer than 500 employees to provide paid sick leave and expanded Family Medical Leave Act (FMLA) leave for certain COVID-19 reasons. The DOL revisions were a response to a New York federal court decision issued on August 3, 220, which held that several provisions of the Act were invalid. The revisions became effective on September 16, 2020, reaffirming with further explanation two provisions in the law and amended two other provisions. Specifically, the revised regulations:

- Reaffirmed that employees are NOT eligible for FFCRA leave if the employer has no work available.
- Narrowed the definition of "health care providers" whom employers may exclude from the leave provisions of the FFCRA.
- Clarified when employers can require employees to provide notice of the need for FFCRA leave with supporting documentation.
- Reaffirmed that intermittent leave must be approved by employer under the FFCRA.

The revised regulations reaffirm the DOL's original position that FFCRA leave is not available to employees when the employer has no work available for them. Therefore, even if the employee has an FFCRA qualifying reason for leave, the employee is not eligible if the employer has no work for the employee to perform. The revised regulations clarified that the employer must have a legitimate, non-discriminatory reason for unavailable work.

The New York federal court decision issued on August 3, 2020, found that the DOL's original definition of "health care provider" was overly broad because it covered employees whose roles had no causal relationship to health care services. Therefore, the revised regulations narrowed the definition and limited the exclusion of coverage to employees involved in the actual providing of medical care to essentially track the definition provided in 29 CFR 825.102. For example, under the revised regulations, the definition of "health care provider" includes doctors, nurses, nurse assistants, medical technicians, and laboratory technicians who process test results to aid in diagnosis and treatment. Excluded from the definition of "health care provider" for example are employees who do not themselves provide health care services such as computer professionals, building maintenance staff, human resource personnel, cooks and food service works, and records and billing employees.

The DOL made two changes regarding the timing of employee notice and documentation. The revisions now state that notice for expanded FMLA leave (i.e., leave for childcare reasons) must be provided "as soon as practicable", which normally means before the leave is taken. Similarly, supporting documentation of the need for FFCRA leave should be submitted "as soon as practicable". According to the DOL, this means at the same time as the employee gives notice.

Finally, the DOL revisions confirm that the employee must obtain the employer's permission in order to take "intermittent leave" under the expanded FMLA provisions. If the employer refuses to approve the request, the leave may not be taken intermittently.

What are the takeaways for employers?

- Employers should follow the revised regulations and confirm their leave policies accordingly.
- Employers should confirm that their leave request forms are consistent with the revised rules including the definition of health care provider.
- Employers previously treating their entire workforce as exempt under the "health care provider" exemption should review whether the revised definition now requires coverage for some employees.
- Further, employers should review their leave request forms to ensure they are consistent with the "as soon as practicable" language.
- Finally, because the DOL continues to refine its FFCRA guidance, employers should continue to monitor the DOL's website regularly.

DOL FINAL JOINT EMPLOYER RULE STRUCK DOWN

In March, 2016, the Department of Labor ("DOL") issued a final rule ("Final Rule"), narrowing the definition of joint employment under the Fair Labor Standards Act ("FLSA"). The concept of "joint employment" renders more than one employer jointly and severably liable for damages for FLSA violations. By way of example, primary contractors and sub contractors may be joint employers. The same can be said about temporary agencies and the client employer. The joint employer doctrine has been recognized by the DOL since 1939. When the Final Rule went into effect, it established a 4-factor test for joint employer status, which primarily focused on the control purported employers had over employees.

After the Final Rule went into effect, 18 states sued to vacate the Final Rule, alleging it violates the Administrative Procedure Act (State of New York, et al. v. Scalia et al., Case No. 1:20-cv-01689). The states and the DOL filed cross motions for summary judgment. On September 8, 2020, the United States District Court for the Southern District of New York granted summary judgment in favor of the states and, in part, in favor of the DOL. In significant part, the court held the Final Rule is inconsistent with the FLSA, striking it down as unlawful.

So, what does this mean for employers?More than likely, it means employers are back to square one and operating under the older more expansive DOL standard, which focused the determination of employment and joint employment on the extent to which the employee depended economically on the purported employer. Of course, the DOL may appeal the New York District Court's decision. Stay tuned.

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