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Employment Law Update: A Guide for Employers and Parents Regarding School and Childcare Center Closures

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New Jersey Governor Phil Murphy recently announced that New Jersey primary and secondary schools (kindergarten through 12th grade) will be closed through at least May 15, 2020. New York, Connecticut, Delaware, and Massachusetts have issued similar extensions, and Pennsylvania and Virginia have closed schools through the end of the current school year.

On March 25, 2020, Governor Murphy signed Executive Order No. 110 ordering the closure of all New Jersey childcare centers by April 1. Exempt from these closures are childcare centers that certified by March 27, 2020 that they will only serve as emergency childcare centers for the children of essential workers as defined in the Order.

As both a parent of elementary school children and a full-time employment lawyer, I recognize that these closures, and the effects of COVID-19 in general, have many of us in a tailspin. Indeed, in addition to school closures, parents may also be facing the closure of summer camps and similar recreational programs.

The employment lawyer side of me recognizes that recent legislative changes are complicated and can be confusing but breaking them down for employers and employees is critical to everyone moving forward through this pandemic. As such, this Alert is intended to assist both employers *and* employees who are the parents of school-age children in understanding their rights under the current sick/family leave and unemployment benefits laws.

There are four laws that may apply in a school/childcare closure employment law situation, as follows:

- The Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, both components of the federally enacted Families First Coronavirus Response Act (FFCRA) which

Attorneys

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Published Articles (Cont.)

applies to private employers with less than 500 employees, and most governmental employers, and which became effective on April 1, 2020;

- The New Jersey Earned Sick Leave Law, which has no minimum or maximum employee threshold, and which was effective on October 29, 2018;
- The New Jersey Family Leave Act, which applies to employers with 50 or more employees nationwide, and with its COVID-19-related sections effective as of March 25, 2020; and
- The Coronavirus Aid, Relief, and Economic Security (CARES) Act, which was enacted on March 27, 2020 and includes federally augmented unemployment insurance benefits provisions.

An employee can avail themselves of one or more of these laws, although with certain limitations, and the New Jersey Department of Labor and Workforce Development has suggested the use of the available laws in the following order:

1. FFCRA's Emergency Paid Sick Leave Act provides for **80 hours of employer paid leave** available until December 31, 2020, and may not be rolled over by the employee. This leave, which can also be intermittent, entitles the employee to a 2/3 rate of pay capped at \$200 a day and a total of \$2,000. Private sector employers that provide this paid sick leave and expanded family and medical leave required by the FFCRA (#3 below) are eligible for reimbursement of the costs of that leave through refundable tax credits.
2. New Jersey Earned Sick Leave Law provides a maximum of **40 hours of employer paid leave** (employees can accrue up to one hour for every 30 hours worked), but only if the employee has any hours remaining in his or her benefit year. This is paid at the employee's full rate, and can be carried over to the next benefit year, or bought out by the employer.
3. FFCRA's Emergency Family and Medical Leave Expansion Act provides for **12 weeks of leave** to care for a child out of school due to COVID-19. The **first two weeks are unpaid**, although an employee may use the leave described in #1 and #2 above to cover a portion of the pay for those weeks, or accrued vacation time, but they cannot be compelled to do so by their employer. The remaining **10 weeks are paid by the employer**, at a 2/3 rate of pay capped at \$200 a day and a total of \$10,000. This leave period can also be a reduction in the employee's workday or workweek to, for example, allow the sharing of parental responsibilities with a spouse. In fact, an employee needs to attest to their employer that no other suitable person is available to care for their child during the requested period. Using this leave would exhaust the employee's federal FMLA leave for the next 12 months.
4. Under Title II of the CARES Act, an employee who cannot work because their child is out of school and requires care qualifies for **unemployment insurance benefits**. Title II also addresses work share scenarios where an employee could be given reduced hours to care for a child. The CARES Act also provides an additional 13 weeks of federally funded benefits for a total of **39 weeks** of total unemployment benefits. The CARES Act also provides that all unemployment insurance beneficiaries will receive an additional federally funded \$600

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through July 31, 2020. The unemployment benefits are still administered by the State of New Jersey, including the additional federal monies. By way of example, unemployment insurance benefits in New Jersey for a full-time employee are calculated as 60% of the individual's pay, not to exceed \$713 per week. With the CARES Act, an unemployment benefits recipient can now receive up to \$1313 until July 31, 2020.

A new wrinkle to the available laws for parents with children out of school is the recent amendment to New Jersey's Family Leave Act passed on April 14, 2020. The Act now provides for up to 12 weeks within a 24-month period of unpaid "family leave" for an employee to provide care to a family member necessitated by the COVID-19 pandemic. Childcare issues are included in these covered scenarios. It is unclear whether the New Jersey Family Leave Act's 12 weeks of unpaid leave would run concurrently with the FFCRA leave, but additional guidance on this issue is expected from the New Jersey Department of Labor and Workforce Development.

Finally, an employer with fewer than 50 employees can seek an exemption from the FFCRA's paid sick and family leave provisions in certain instances. Specifically, a small business may be exempt if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if (1) the employer employs less than 50 employees; (2) leave is requested because the child's school or place of care is closed, or a childcare provider is unavailable, due to COVID-19 related reasons; and (3) an authorized officer of the business has determined that at least one of the following three conditions is satisfied:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The duration of COVID-19-related school closures is still uncertain, and the laws available to parents to care for children out of school are still evolving. However, the state and federal laws that are available to assist parents in these situations are considerable. On the other hand, the cost to employers to cover these periods of leave is also significant.

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Employers should look to offset these expenditures through tax credits, small business loans under the CARES Act, and, when necessary, weigh the additional unemployment insurance benefits available to furloughed employees if an employer cannot continue to maintain their workforce.

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