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CLIENT ALERT: Executive Office for Administration and Finance Issues COVID-19 Emergency Paid Sick Leave Frequently Asked Questions

On May 28, 2021, Governor Charlie Baker signed into law new legislation ordering Massachusetts employers to provide employees up to 40 hours of COVID-19 emergency paid sick leave, discussed in further detail here. Last week, the Executive Office for Administration and Finance launched a COVID-19 Temporary Emergency Paid Sick Leave Program website, which has recently been updated to add a list of frequently asked questions addressing a number of topics, including, without limitation, the following:

Employees who were already offered 80 hours of Emergency Paid Sick Leave under the federal Families First Coronavirus Response Act ("FFCRA") or voluntary extensions thereof may still be entitled to up to 40 hours of Massachusetts COVID-19 emergency paid sick leave between May 28, 2021 and the termination of the mandate. If an employee took leave under the federal program prior to May 28, 2021, the state leave may be in addition to the federal leave. If the employee has not exhausted their federal leave, the state and federal leave may run concurrently on or after May 28, 2021, so long as the state mandated leave is met in full.

The FFCRA tax credit program is primary for employers who are eligible. If applying for state reimbursement, employers must attest that they are ineligible for federal tax credits.

FFCRA-eligible employers who have opted out of the voluntary extension may be considered ineligible for the federal tax credits and thus may access the state reimbursement. As stated above, when applying for reimbursement, employers must attest that they are ineligible for the federal tax credit. Employers may be "ineligible" either because they are categorically disqualified, or because the parameters of the leave program the employer offers do not meet federal requirements. *In other words, FFCRA-eligible employers who "opted out" of voluntarily extending the FFCRA may seek*

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reimbursement from the Commonwealth for Massachusetts COVID-19 emergency paid sick leave provided to its employees.

Notice must go to all employees with a primary place of employment in the Commonwealth. This includes those employees who are also eligible for leave under the FFCRA.

An employee's "primary place of employment" means the worksite or physical location where the employee spent the greatest percentage of work hours between the dates of January 1, 2020 and April 30, 2021. Temporary telecommuting arrangements entered into during this period should not factor into this determination. For a new employee who commences work on or after May 1, 2021, "primary place of employment" means the worksite or physical location where the employee is expected to spend the greatest percentage of work hours between the first day of work and September 30, 2021, based on the arrangement agreed to between employer and employee.

Paid absences prior to May 28, 2021 are not eligible for reimbursement from the MA COVID-19 Emergency Paid Sick Leave Fund. The law is prospective, so prior absences are ineligible.

For leaves related to an employee's or family member's COVID-19 diagnosis or treatment, employers must request medical documentation in order to claim state reimbursement. Any health information must be maintained as confidential medical records in accordance with applicable state and federal law, and must not be disclosed to third parties without the employee's express permission.

Likewise, for leaves related to an employee obtaining or recovering from a COVID-19 vaccine, employers must request documentation of the immunization in order to claim state reimbursement. Again, this documentation must be treated as a confidential medical record in accordance with applicable state and federal law.

The law applies to both new and temporary employees. Note, however, that the hours the employer must offer are pro-rated for those with part-time schedules.

There is no waiting period for new hires. Employees are eligible for leave immediately upon hire.

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Massachusetts residents who work in another state are not eligible for leave unless they have a primary place of employment in Massachusetts. An employee's "primary place of employment" is defined above.

The law applies to businesses based in neighboring states with employees who live in Massachusetts and work from home, if the employee's primary place of employment is in Massachusetts. For employers with a mix of Massachusetts and out of state employees, only employees whose primary place of employment is in Massachusetts are eligible.

The law applies to employers of all sizes. Unlike the federal FFCRA, there is no employee threshold for coverage.

An employee does not necessarily need a positive COVID-19 test to qualify for COVID-19 sick leave. An employee must, however, have a positive diagnosis of COVID-19, such as a positive COVID-19 test or a diagnosis by a healthcare professional, in order to qualify for leave.

With limited exception, employers with existing sick time policies are required to provide additional leave under the Massachusetts COVID-19 emergency paid sick leave law. Generally, Massachusetts COVID-19 emergency paid sick leave must be provided in addition to otherwise available sick time. Employers who voluntarily offer emergency paid sick leave under the FFCRA may run such leave concurrently with the Massachusetts COVID-19 emergency paid sick leave, so long as the state mandate is met in full, including 40 hours (or a pro-rated amount for part-time employees) beginning May 28, 2021.

Employers with separate paid time policies allowing employees to obtain a COVID-19 vaccine may run that leave concurrently with Massachusetts emergency paid sick leave. This is permissible so long as the paid-time off is compensated at the employee's regular rate of pay, and with the same benefits to which the employee is usually entitled.

Employees may be permitted to supplement their Massachusetts emergency paid sick leave (capped at $850 per employee) with PTO in order to earn their normal rate of pay. Once the $850-dollar cap is hit, the leave times may run concurrently. The $850 cap is a total cap per employee, and not a weekly cap.

MBJ will continue to monitor and update clients on new developments in this law. Employers with questions about the new COVID-19 emergency paid sick

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leave law should consult with their MBJ attorney.

Jaclyn L. Kugell and Jaclyn L. Kawka are attorneys with Morgan, Brown & Joy, LLP. They may be reached at (617) 523-6666 or at jkugell@morganbrown.com, and jkawka@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

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