Bond

INFORMATION MEMO
HIGHER EDUCATION

APRIL 1, 2020

Treatment of Student Workers Under the COVID-19 Emergency Family Medical Leave Expansion Act and the Emergency Paid Sick Leave Act

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act, which enacted the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. These Acts make new categories of leave available to eligible employees of covered public employers as well as private employers with fewer than 500 employees. This 500-employee threshold has left many higher education institutions wondering whether their student workers may be counted as employees and whether their students are entitled to leave.

Do Student Workers Count as Employees?

Generally, students are considered employees under the Fair Labor Standards Act (FLSA). Both the Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act borrow the FLSA's definition of employee. Therefore, many student workers may be counted as employees in determining whether a college or university exceeds the 500-employee threshold.

Though many students may be counted as employees, the U.S. Department of Labor (DOL) has offered some limiting guidance. The DOL has specifically provided that students who work in food services, usher events, sell programs at events or wash dishes in dining halls and anticipate compensation are considered employees. On the other hand, graduate teaching assistants, resident hall assistants and research assistants will typically not be considered employees when compensated by stipend or through other forms of compensation such as room and board or tuition credits. The offered rationale for this distinction is that when a student receives compensation and his or her duties are not part of an overall educational program, an employment relationship will generally exist. Under this guidance, a significant number of student workers will ordinarily be considered employees.

Despite these general rules, the question of counting student workers for purposes of the 500-employee threshold set by the Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act is somewhat unsettled. As most campuses find themselves in uncharted territory, dealing with distance learning and far less crowded campuses, there are new questions as to which student workers continue to be employees. The DOL has not specifically addressed this question in light of the new legislation. However, the DOL has provided that the number of employees is to be determined at the time leave is taken, and employees on paid or unpaid leave, taking a leave of absence and even those on disciplinary suspension are counted, but those with whom the employment relationship has ended are not. Under these rules, it remains clear that student workers who are telecommuting or working remotely are employees and may be counted. Less clear is the treatment of students who are off-campus and not capable of remote work. Until the DOL issues additional guidance the answer to this latter question remains uncertain and likely depends on the circumstances of each institution.

Student Workers' Eligibility for Emergency Family and Medical Leave Expansion Act

Compared to the standard FMLA, the definition of eligible employee under the Emergency Family and Medical Leave Expansion Act has changed dramatically. The new legislation provides that an employee is eligible for leave as long

as they have been employed for at least 30 days. Many students who did not previously meet the definition of eligible employee because they failed to meet the length of service requirements under the standard FMLA may meet this new definition.

Though more student workers are likely "eligible employees" as defined by the new provisions does not mean they are entitled to COVID-19 FMLA leave. The FMLA only entitles eligible employees of *covered employers* to take leave. The employer threshold has also changed so that only those employers with fewer than 500 employees are "covered employers." Importantly, this threshold speaks in terms of "employees," not "eligible employees." While many students may be eligible employees under the new definition, they are not entitled to COVID-19 related FMLA leave unless they work for a covered employer as defined by the 500-employee threshold. Therefore, a student worker who has been employed for 30 days, is still not entitled to leave under the COVID-19 FMLA provisions if they work for a college or university with more than 500 employees.

If you have any questions about the treatment of student workers and COVID-19 related leave, please contact Hannah Redmond, Gail Norris, Jane Sovern, any attorney in the Higher Education Practice Group, or the attorney in the firm with whom you are regularly in contact.