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LABOR AND EMPLOYMENT LAW

JUNE 27, 2020

Impact of Executive Order 205 on Employee Travel

** This article has been updated to reflect the impact of Executive Order 202.45. **

On June 24, 2020, Gov. Andrew Cuomo issued Executive Order 205 (EO 205), which sets forth restricted travel areas within the U.S. for New Yorkers and those traveling to New York. If an individual arrives in New York after having spent more than 24 hours in a restricted area, the individual could be subject to a 14-day quarantine. This quarantine must be carried out in accordance with New York Department of Health (DOH) regulations for self-quarantining, and violators are subject to penalties of up to $10,000. The DOH reports that it will update the list of restricted states weekly. For more information on EO 205 and the DOH guidance, please see our earlier client alert.

EO 205 creates several questions for employers. First, employers must determine which personnel are subject to the mandatory quarantine when returning from a restricted travel area. The DOH guidance appears to draw a distinction between non-essential and essential workers (both those traveling to New York for work and New York residents returning to the State). Non-essential workers must quarantine for 14 days when they arrive in New York after spending more than 24 hours in a restricted travel location. Essential workers who are New York residents, on the other hand, are arguably not subject to the 14-day quarantine when they are returning to the State. Instead, the DOH guidance links to earlier New York guidance for essential workers, and also contemplates that essential workers will follow guidance specific to their industries. Essential workers who are non-New York residents and who arrive in the State must follow the DOH's guidance for short, medium or long-term visits.

Employers must then consider whether state COVID-19 related benefits apply to non-essential employees who are subject to the 14-day quarantine upon returning to New York. NY COVID-19 leave allows for up to two weeks of paid sick leave (depending on the size and type of employer) when an employee is "subject to an order of quarantine or isolation issued by the State of New York." EO 205 arguably constitutes such an "order of quarantine." However, EO 202.45, issued after EO 205, states that individuals who voluntarily travel to a restricted travel area are not eligible for NY COVID-19 leave.

Employers must ask a similar question regarding the applicability of federal leave to employees returning from travel to restricted areas. Under the federal Emergency Paid Sick Leave (E-PSL) law, full-time employees at a covered employer are allowed to take up to 80 hours of leave at their regular rate of pay (subject to statutory caps) if they are subject to "a Federal, State, or local quarantine or isolation order related to COVID-19." Whether EO 205 is an "order of quarantine" sufficient to trigger E-PSL is not expressly addressed in the federal guidance, which arguably creates some uncertainty at this time as to the application of E-PSL. However, it is important to note that violations of E-PSL are enforceable through private legal actions, and that the failure to pay an E-PSL claim is considered to be a failure to pay minimum wage, enforceable under the Fair Labor Standards Act.

Employers may also be considering whether to restrict employees from traveling to the virus-impacted areas within the U.S. Such a policy could raise a potential legal concern under New York Labor Law Section 201-d, which prohibits employers from discriminating against employees for their lawful recreational activities. While vacation travel is arguably within the class of protected recreational activities, a limitation on travel tied to the health risks associated with the travel destination may well be defensible. Further, although Labor Law Section 201-d contains an exception when the recreational activity creates a "material conflict of interest" relating to the employer's business interests, the application of this provision in the case of an employer denying travel to restricted areas would likely turn on the specific factual situation. No reported court decision has addressed the interpretation of Section 201-d in this context. Additionally, for municipalities, school districts, and other public sector employers to restrict or prohibit travel between states may raise constitutional questions.

If you have questions about the impact of Executive Order 205 on your business, please contact Jessica Moller, Theresa Rusnak or the attorney at the firm with whom you are regularly in contact.