Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2020 Issue 2

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The CARES Act and Student Loans: How the CARES Act Affects Garnishments related to Student Loans

by Haley A. Drusen

The coronavirus pandemic has touched all parts of American society and has left many wondering how they will pay their living expenses and bills. In relation to this concern, Congress passed the CARES Act in late March, which provided certain federal student loan borrowers with relief in the form of suspended payments through September 30, 2020. The CARES Act not only provided this relief to borrowers paying their loans through loan servicers, but also to those who were having their wages administratively garnished by the Department of Education under the Higher Education Act (HEA). Since most federal student loan servicers have already placed a suspension on payments of student loans, many employees who have been having their wages garnished in relation to student loans have been approaching their employers regarding when they should expect relief from garnishment and whether they will be getting a refund of garnished wages. While it is understandable that these employees are expecting prompt relief, Districts should be aware of the limitations on their actions regarding these student loan garnishments.

While most individuals are familiar with the process of garnishment (or withholding wages for the payment of certain debts), the process used to garnish wages by federal executive agencies is atypical in that it is an administrative process. Two federal laws allow the Department of Education to administratively garnish a borrower's wages in relation to delinquent federal student loans: the Higher Education Act (HEA) and the Debt

Collection Improvement Act (DCIA). Under these acts, the Department of Education may, after notice to the borrower, directly garnish the borrower's wages without having to obtain a court order.

In light of the economic impact of the COVID-19 pandemic, U.S. Secretary of Education Betsy DeVos took action to suspend the garnishment related to certain student loans in Mid-March. This action was extended by President Trump under the CARES Act, which provided that certain administrative garnishment for federal student loans must stop until September 30, 2020. According to an FAQ issued by the U.S. Department of Education (USDOE) office of Federal Student Aid, employers should receive a letter directing them to stop garnishment payment. Especially as the paused garnishment period only applies to certain garnishment actions in the CARES Act (namely those garnishments issued under the HEA rather than the DCIA), it is important that Districts receive confirmation from the federal agency to suspend garnishment prior to taking action. Therefore, until the District receives notice to suspend garnishment, it should continue to remit garnished wages.

Though it appears that the Department of Education is still in the process of sending employers notice to suspend the garnishment of wages under the HEA Act, the Department of Education has stated that funds received since March 13, 2020 related to a garnishment that has been suspended are eligible for refund to the employee through the USDOE. Employees who which to receive a refund of garnished wages should contact the USDOE directly about receiving a refund.

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District administration should be cognizance that the forbearance on garnishment provided by the CARES Act does not apply to court-ordered garnishments, whether or not those garnishments are for student loans (typically court-ordered garnishments are for the payment of a judgment, private student loans, or child support). Garnishments initiated by court order will continue as usual, absent any future actions by state or federal officials.

RFR stands ready to help Districts with questions concerning garnishments, human resources issues, or payroll considerations in light of the COVID-10 pandemic. Districts with questions should contact their RFR school attorney to walk them through any pandemic related concerns.

Providing Payroll Taxes and the Families First Coronavirus Response Act

by Adam S. Breipohl

The Families First Coronavirus Response Act ("FFCRA"), a new federal law governing issues related to the COVID-19 pandemic, includes measures designed to mitigate the financial impact of the pandemic on businesses. These include provisions that offer tax relief to employers to offset the cost of offering the additional paid leave mandated by the FFCRA to their employees, the most significant of which relate to Social Security and Medicare taxes. However, these provisions do not apply in the same way to private employers and public employers. For that reason, it is important that school districts understand which parts of the FFCRA do and do not apply to governmental employers in order to comply with applicable law.

The FFCRA includes two sections granting additional paid leave to employees of an entity covered by that statute: The Emergency Paid Sick Leave Act (the "EPSLA") requires a covered employer to provide an employee with up to two weeks of paid sick leave if the employee is required to miss work due to COVID-19 (e.g. the employee has been ordered to quarantine pending the result of a test), and the Emergency Family and Medical Leave Expansion Act (the "EFMLEA") allows employees to take up to two weeks of unpaid family and medical leave, followed by up to ten weeks of paid leave at a reduced rate of pay[1] to care for a child whose school is closed due to a shelter-in-place order, etc. In order to offset the costs to employers associated with these mandates, the FFCRA also includes tax credits for employers in amounts corresponding to the wages the employer has paid to employees on EPSLA/EFMLEA leave. However, the FFCRA specifically provides that governmental employers, including political subdivisions such as school districts, are not eligible for these tax credits. Hence, governmental employers are required to bear the costs of wages paid to employees on FFCRA leave themselves.

In contrast, another provision of the FFCRA provides that wages required to be paid under the EPSLA or EFMLEA are not considered "wages" for purposes of calculating the employer's share of the social security tax. Because that tax is calculated based on a percentage of the "wages" paid to the employee, this provision has the effect of relieving employers of the obligation to pay their portion of the social security tax on wages paid to employees who are on paid leave pursuant to the FFCRA. Unlike with regard to the payroll tax credits described above, this provision applies to both governmental and private employers; hence, school districts, like other employers, are not required to remit the employer's portion of social

security taxes for any employees who are on EPSLA or EFMLEA leave.

Finally, it is worth noting that regulatory guidance recently issued by the Internal Revenue Service ("IRS") states that employers are required under the FFCRA to retain documentation containing certain information in order to substantiate their entitlement to the tax credits provided by that statute. Much of this documentation is very routine in nature, but certain rules call for employers to require employees to make specific, written representations about the reason they are taking leave. It is not completely clear that these requirements also apply to governmental employers, which are ineligible for tax credits under the FFCRA, but can be relieved of the obligation to pay social security tax in some cases. However, the best practice is for governmental employers to retain records containing this information to ensure that they are able to substantiate any non-payment of social security taxes to the IRS if need be.

Overall, the tax issues raised by the FFCRA are just one of many areas school districts must navigate with caution in these unusual times. Districts that require assistance in these areas should not hesitate to contact their legal counsel.

If districts have questions about the FFCRA or other compliance issues related to the current public health situation, RFR is here to help. Your RFR attorney can guide you through compliance with the FFCRA and other applicable law.

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[1] An employee may also elect to supplement EFMLEA leave with other types of accrued paid leave, e.g. electing to use both unpaid EFMLEA leave and paid EPSLA leave simultaneously for the first two weeks the employee is on EFMLEA leave. Doing so allows the employee to receive full pay during a period when he or she is on EFMLEA leave that would otherwise be unpaid or paid at a reduced rate

EEOC Provides COVID-19 Guidance Concerning Anti-Discrimination Laws

by M. Scott Major

As employees return to work from the COVID-19 shutdown, school districts must carefully balance their continuing obligations under workplace anti-discrimination laws while implementing appropriate safeguards and procedures to protect their employees from the COVID-19 virus. This task can feel like walking a tightrope where leaning too far to either side could result in litigation. Fortunately, the Equal Employment Opportunity Commission (EEOC) has issued and continually updates important COVID-19 related guidance for school districts to help them successfully perform this balancing act.[1]

The EEOC enforces workplace anti-discrimination laws like the Americans with Disabilities Act (ADA), and while the coronavirus has severely disrupted schools, these laws still apply during the pandemic.

They do not, however, interfere with or prevent school districts from following guidance issued by the CDC or state and local public health authorities regarding actions that all employers may take concerning COVID-19. Included here is just a small selection of important EEOC guidance available to school districts during the health crisis.

First, school districts may send employees home and prevent them from reporting to work if they have symptoms of COVID-19 without violating the ADA. The CDC has clearly stated that employees manifesting symptoms should leave the workplace, and the ADA does not interfere with this guidance. Furthermore, school districts may also require a doctor's note certifying an employee's fitness for duty after becoming symptomatic.[2]

Second, recently-issued guidance states that employers may administer COVID-19 tests to returning employees (a "medical examination" under the ADA) if the test is "job related and consistent with business necessity."[3] Because individuals with COVID-19 pose a "direct threat"[4] to the health of other employees, the ADA permits these examinations. However, school districts must first ensure their tests are accurate and reliable. [5]

Third, school districts may measure employees' body temperatures, which is also a medical examination under the ADA. This includes daily temperature checks before employees enter the workplace. Additionally, employers may also inquire if employees are experiencing COVID-19 symptoms. However, because the ADA prohibits employers from asking questions that would elicit responses concerning a disability, administrators should consult the CDC for a list of emerging COVID-19 symptoms to guide their queries. As with all employee medical information under the ADA, employee COVID-19 test results, body temperature information, and answers to questions regarding COVID-19 symptoms must be kept confidential and separate from personnel files.[6]

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Fourth, like all employers under the ADA, school districts may screen new employees for COVID-19 with a post-offer, pre-employment medical exam under certain conditions. The ADA permits medical exams after a conditional job offer if the employer requires all entering employees of the same job type to also have the exam. These can include COVID-

19 and body temperature tests. New hire start dates may be also delayed for those with COVID-19 symptoms, but it would be an ADA violation to delay the start dates of asymptomatic persons simply because they are at higher risk from the disease (e.g., 65 and older or pregnant).[7]

Further important COVID-19 guidance for school districts is available from the EEOC regarding reasonable accommodations, layoffs and furloughs, and pandemic-related harassment, all of which should be consulted regularly for updated information.

If you have any questions regarding evolving COVID-19 guidance from the EEOC, please contact your school district's attorney.

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[1]Up-to-date information from the EEOC regarding COVID-19 may be found here: https://www.eeoc.gov/coronavirus/.

[2]U.S. Equal Emp. Opportunity Comm'n, Technical Assistance Questions and Answers: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (updated Apr. 23, 2020): https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm; U.S. Equal Emp. Opportunity Comm'n, EEOC-NVTA-2009-3, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (updated Mar. 21, 2020).

[3]*Id.*

[4]*Id.*

[5]Guidance for selecting an appropriate test is available from the FDA at https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2.

[6]*Supra* note 2

[7]*Id.*

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