APRIL 29, 2021 | STATE & LOCAL TRENDS

Status Update: Maryland Essential Workers' Protection Act

Earlier this month, the Maryland Essential Workers' Protection Act ("Act") made it through both chambers by Sine Die and now awaits action by the Governor. Above all, the bill would require the Maryland Secretary of Labor to establish COVID-19-specific safety regulations, also known as an "Emergency Temporary Standard" ("ETS"), within two weeks after the effective date of the Act. This may take one of two forms:

- if the federal Occupational Safety and Health Administration ("Fed OSHA") has issued an applicable ETS related to COVID–19, that ETS must be adopted (see our previous post regarding the status of Fed OSHA's COVID-19 ETS rulemaking); or
- if Fed OSHA has not issued an applicable ETS related to COVID–19, a State ETS must be adopted that:
  1. meets or exceeds the guidance provided in "Guidance on Mitigating and Preventing the Spread of COVID–19 in the Workplace" published on January 29, 2021, by Fed OSHA; and
  2. complies with certain additional criteria, requiring employers to:
     - notify the Maryland Department of Health within 24 hours after the confirmation of a positive case of COVID–19;
     - notify the Maryland Department of Health within 24 hours after the confirmation of three or more employees at a workplace testing positive for COVID–19 within a 14–day period;
     - post in a location visible to employees at the work site: information regarding COVID–19 symptoms; protocols for an employee's reaction to experiencing COVID–19 symptoms; the minimum safety standards developed under the regulations; and the process for submitting a complaint to Maryland Occupational Safety and Health; and
     - comply with the prohibitions relating to terminating or discriminating against employees.

Importantly, the bill provides that "[t]his subtitle applies only to essential employers in industries and sectors identified by the Governor or a Federal or State agency as critical to remain in operation during the emergency[,]" where "emergency" is defined as "[a] catastrophic health emergency, as defined [under a certain section of the Public Safety Article], that is the subject of an Executive Proclamation . . . and is related to a communicable disease." The bill also offers a two-part definition for "essential employer," providing that an "essential employer" means a "person that employs an essential worker" and that an "essential worker" means "an individual who: (1) performs a duty or work responsibility during an emergency that cannot be performed

remotely or is required to be completed at the work site; and (2) provides services that the essential employer determines to be essential or critical to its operations." Essential employers may not "knowingly misclassify an essential worker as an independent contractor or other classification in order to avoid paying an essential worker any benefits due during an emergency . . ."

Key safety and health requirements for covered employers include, but are not limited to, the following:

- Subject to availability, provide necessary amounts of safety equipment recommended for usage during the emergency at no cost to essential workers.
- Adopt, maintain, and post written protocols to ensure an essential worker's access to information regarding the applicable safety standards in effect during the emergency.
- Provide or implement any other measures or requirements set by the Governor or a Federal or State agency to ensure the general health and safety of essential workers.
- During an emergency, if an essential worker or any other workers has contracted the communicable disease that is the subject of the emergency at the work site, take proactive steps to minimize the risk of transmission, including informing essential worker that they may have been exposed.
- Unless an essential workers is able to obtain testing free of charge, if an essential worker's health insurance coverage or other benefits do not cover the cost of testing for the communicable disease that is the subject of the emergency, during the emergency, pay for testing for the communicable disease.
- Report all positive test results to the Maryland Department of Health, and, when reporting, include demographic information about the essential worker and redact any personal identifying information to protect the identity of the essential worker.

Additionally, the bill provides that essential workers have the "right to refuse to perform an assigned task under [a certain section of this article and corollary regulations]."

The bill also sets forth requirements for "public health emergency leave," defined as "paid leave that an essential employer provides to an essential worker during an emergency as required under [a certain subsection of this section]." The public health emergency leave section only applies, however, if the Federal or State government provides funding that can be used for public health emergency leave. Should such funding become available, essential employers must provide an essential worker with public health emergency leave on the date the funding is made available to the essential employer. The bill sets forth the specific conditions under which public health emergency leave may be taken, as well as the amounts of leave to which covered workers are entitles and documentation requirements.

With respect to the conditions under which public health emergency leave may be taken, the bill provides that each essential employer must allow an essential worker to use public health emergency leave in relation to an emergency:

- To isolate without an order to do so because the essential worker: has been diagnosed with the communicable disease that is the subject of the emergency; or is experiencing symptoms associated with the communicable disease that is the subject of the emergency and is awaiting the results of a test to confirm the diagnosis.
- To seek or obtain a medical diagnosis, preventive care, or treatment because the essential worker is diagnosed with the communicable disease that is the subject of the emergency.

- To care for a family member who is isolating, without an order to do so, because of a diagnosis of the communicable that is the subject of the emergency.
- Due to a determination by a public health official or health care professional that the essential worker's presence at the place of employment or in the community would jeopardize the heath of other individuals because of the essential worker's exposure to, or exhibited symptoms associated with, the communicable disease that is the subject of the emergency, regardless of whether the essential worker has been diagnosed with the communicable disease.
- To care for a family member due to a determination by a public health official or health care professional that the family member's presence at the place of employment or in the community would jeopardize the heath of other individuals because of the family member's exposure to, or exhibited symptoms associated with, the communicable disease that is the subject of the emergency or due to symptoms exhibited regardless of whether the family member has been diagnosed with the communicable disease.
- To care for a child or other family member: when the care provider of the family member is unavailable due to the emergency; or if the child's or family member's school or place of care has been closed by a Federal, State, or Local public official or at the discretion of the school or place of care due to the emergency, including if the school or place of care is physically closed but providing instruction remotely.

The bill provides a specific definition for "family member," which includes: biological children, adopted children, foster children, and stepchildren of the essential worker; biological parents, adoptive parents, foster parents, and stepparents of the essential worker or of the essential worker's spouse; the spouse of the essential worker; biological grandparents, adopted grandparents, foster grandparents, and stepgrandparents of the essential worker; biological grandchildren, adopted grandchildren, foster grandchildren, and stepgrandchildren of the essential worker; biological siblings, adopted siblings, foster siblings, and stepsiblings of the essential worker; among others

If an essential worker believes that an essential employer has committed violations, the bill provides specific methods of recourse for the worker. It also prohibits employers from discharging or otherwise discriminating against an employee because the employee is an essential worker who files a compliant or exercises a right under certain provisions of the law.