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FEW Washington Update August 1-15, 2020

[National Immunization Awareness Month](#)

In Congress

Congressional talks continue with no clear indication that agreement is near on the emergency relief package under discussion. The Senate \$1 trillion Health Care, Economic, Assistance, Liability, and School Act proposal announced nearly two weeks ago kicked off more serious negotiations with the House who had passed the Health and Economic Recovery Omnibus Emergency Solutions Act in May. Leaders of both bodies have stated they intend to pass something before the traditional August recess more formally begins, and both parties are scheduled to hold their presidential nominating conventions – virtually – later in August.

Recently, President Trump announced four executive orders which were in response to the lack of progress by Congress on its economic relief package. The executive orders drew immediate debate on whether the President had authority to change federal taxes and extend federal spending without Congressional approval, but if a congressional emergency relief deal is reached this week it may become moot on one or more of these orders.

The four executive orders:

- [Executive Order](#) to defer Social Security and Medicare payroll tax obligations for Americans earning less than \$100,000 during the COVID-19 crisis.
- [Executive Order](#) to extend supplemental \$400 per week in unemployment benefits during the COVID-19 crisis.
- [Executive Order](#) to extend student loan payment relief through the end of 2020.

- [Executive Order](#) to renew a moratorium on evictions to aid renters during the COVID-19 crisis.

FEW Washington Update – August 1-15, 2020 Tier I

Paid Leave:

The Office of Personnel Management (OPM) has issued rules to carry out the paid parental leave authority that will be available to most of the federal workforce for births, adoptions and foster placements occurring on October 1 or later, even as Congress considers expanding that benefit to include many of the employees currently left out.

The rules carry out a law enacted late last year allowing employees to change from unpaid to paid the 12 weeks of unpaid leave available under the Family and Medical Leave Act (FMLA). The paid leave entitlement will apply only to categories of employees eligible under the FMLA, which requires one year of total federal service before eligibility and excludes temporary and intermittent employees.

The rules note several important distinctions, however, related to how last year's law was written, including:

- Although the FMLA provides for leave for both parental and various other purposes, the paid leave will apply only for parental purposes as that law defines them.
- While the FMLA allows for taking unpaid leave within a 12-month period that starts before a birth, adoption or foster placement, the paid leave will be available only for the 12-month period after that event.
- Any amount of unpaid FMLA leave taken for either parental or other purposes will reduce the amount of time available to take as paid parental leave within the pertinent period. However, employees will remain free to substitute other forms of paid leave—such as annual leave or, in some circumstances, sick leave—for unpaid FMLA leave.

Other key provisions include that: in a two-federal-employee household, each parent will be eligible; the paid leave entitlement expires at the end of the 12 months and cannot be carried forward or converted into cash; and employees using paid leave must promise to return to work for at least 12 weeks afterward or else repay the government's contribution toward Federal Employees Health Benefits (FEHB) Program for that time, although agencies may waive that obligation.

The announcement comes as no final action has been taken to extend the entitlement to employees outside the Title 5 civil service laws, who were left out of the law when it was enacted late last year. That includes the Federal Aviation Administration (FAA), Title 38 medical personnel, Transportation Security Administration (TSA) employees

other than screeners (who are also outside Title 5 but were specifically included) and several other smaller categories.

The House has added language to the Department of Defense (DoD) authorization bill to cover those employees but the Senate counterpart does not include similar language and final action is not expected on that bill until September at least. The VA has said that it will extend the authority to its Title 38 personnel in any case.

Postal Service employees also are not covered but the proposal before Congress would not extend the policy to them. Meanwhile, the rules say that employees of the U.S. Securities and Exchange Commission (SEC) and Federal Deposit Insurance Corporation (FDIC), which currently offer six weeks of paid parental leave on their own, will fall under the broader eligibility.

Sourced from [FedWeek](#).

Benefits:

The discussions between the White House and the House Majority continued over a potential virus relief bill — which resulted in President Trump taking a number of executive actions last weekend — has left a series of potential provisions important to federal employees on the shelf.

A chance still remains of an agreement that would translate into a more sweeping law, but little apparent progress has been made to resolve the deep differences over policies and spending levels that have characterized the negotiations over the last month. Since President Trump took his actions — which are being questioned on grounds that they exceed a president's authority — the situation has been in a standstill, with a broader agreement not ruled out but with no firm steps being taken toward one.

President Trump's actions focused mainly on unemployment benefits, not an issue for federal employees due to the pandemic although potentially affecting family members, as well as protections from evictions. One provision of potential direct impact on federal employees encouraged employers to allow workers making less than \$2,000 a week to defer until year's end Social Security taxes due starting September 1. The government has not yet said whether it will apply that policy to its own employees.

The Presidents' three memos and one executive order did not address a range of other issues that the House had advocated for a relief bill, including more hazardous duty pay and other benefits for frontline employees and requirements that teleworking employees be kept in that status until certain standards are met.

Also not addressed was the funding shortfall at U.S. Customs and Immigration Services which arose after the House had passed its bill in May. A proposal from the Senate

Majority would have provided the \$1.2 billion the agency has requested to head off furloughs of some 13,400 employees now set for the end of the month.

Sourced from [FedWeek](#).

FEW Washington Update – August 1-15, 2020 Tier II

Whistleblower Protections:

The House Majority has introduced HR-7935, to limit disclosure of a whistleblower's identity, prohibit retaliatory investigations, expand whistleblower protections to all noncareer appointees in the Senior Executive Service, and provide access to jury trials for whistleblowers.

The Whistleblower Protection Improvement Act also would clarify that no federal official may interfere with a federal employee's ability to share information with Congress.

Also introduced were HR-7936 and S-4438, to increase protections against retaliation for filing Freedom of Information Act requests or Privacy Act requests. "These transparency laws are intended as tools for the public to obtain government information, and federal employees must be free to use the laws in the same way as any other member of the public," sponsors said in introducing them.

Whistleblower Protection

A federal employee or applicant for employment engages in whistleblowing when the individual discloses to the Office of Special Counsel or to an Inspector General or comparable agency official (or to others, except when disclosure is barred by law or by executive order to avoid harm to the national defense or foreign affairs) information which the individual reasonably believes evidences the following types of wrongdoing:

- a violation of law, rule, or regulation;
- gross mismanagement;
- a gross waste of funds;
- an abuse of authority; or
- a substantial and specific danger to public health or safety.

Read more on federal employee whistleblower protections [here](#).

Sourced from [FedWeek](#).

FEW Washington Update – August 1-15, 2020 Tier III

Leave During the Pandemic:

OPM has issued interim rules on protecting federal employees from losing annual leave under “use or lose” leave rules if they are unable to take leave for reasons related to the pandemic, adding that the same policies also will apply to future national emergencies.

Generally, federal employees may carry forward no more than 30 days (240 hours); they must use annual leave in excess of that amount by the end of a leave year or forfeit it. The current leave year ends January 2, 2021. An agency may restore leave that the employee was unable to use for reasons including an agency-determined “exigency of the public business”—but only if the employee had scheduled to use the leave before a cutoff date, which this year will be November 21.

That restriction has caused growing concern as this year has progressed for employees who have been in frontline positions or otherwise performing duties that have made it difficult if not impossible for them to work down leave balances to below the carryover limit.

“Because of the unprecedented outbreak and spread of this virus and the efforts toward response and recovery, many federal agencies and employees have been, and for the foreseeable future will continue to be, engaged in work vital to our nation and to the pandemic response. Under current rules, some of these employees will be unable to use sufficient annual leave to avoid exceeding the limit on annual leave that may be carried over into the next year,” OPM said in a Federal Register notice Monday August 10, 2020

The regulations “provide that employees who would forfeit annual leave in excess of the maximum annual leave allowable carryover because of their work to support the nation during a national emergency will have their excess annual leave deemed to have been scheduled in advance and subject to leave restoration,” it says.

Restored leave generally must be used within two years but the rules provide for extending the periods for employees with large amounts of leave at stake and in certain other situations.

OPM further noted that it had followed a similar policy in the runup for employees whose services were in high demand to reprogram computers to avoid the potential “Y2K” problem, but that unlike that action, the new rules also will apply in any future situation in which OPM determines that agencies may invoke the authority.

The policies are effective immediately although comments still can be made within 60 days of the posting.

OPM in June had encouraged agencies to cooperate with employees to make sure they don't lose leave; more recently it said it intended to issue rules along the lines of those now published.

Meanwhile, the House recently accepted an amendment to the annual Department of Defense (DoD) authorization bill to largely the same effect. The Senate version of the bill does not contain a similar provision, which if accepted in an upcoming conference and signed into law would strengthen the provisions.

Sourced from [FedWeek](#).

EEOC:

The Equal Employment Opportunity Commission (EEOC) issued two technical assistance documents this week concerning opioid use by employees and accommodation issues under the Americans with Disabilities Act (ADA). The two documents are not binding and do not make any changes to existing law. Rather, they are meant to “provide clarity to the public regarding existing requirements under the law or agency policies.”

The first document provides [information for employees](#), and the second document provides [information for healthcare providers](#). However, employers would be well served to review both documents, as they provide an understanding of how employers should handle opioid-related accommodations.

Opioids include prescription drugs such as codeine, morphine, oxycodone (OxyContin, Percodan, Percocet), hydrocodone (Vicodin, Lortab, Lorcet), and meperidine (Demerol), as well as illegal drugs like heroin. They also include buprenorphine (Suboxone or Subutex) and methadone, which can be prescribed to treat opioid addiction.

The EEOC documents clarify that the ADA allows employers to fire employees or take other adverse employment actions based on illegal use of opioids, regardless of whether an employee exhibits performance problems. However, if an employee is using opioids legally pursuant to a prescription, including a prescription for opioid addiction, employers may not take adverse action unless they first consider whether the employee can perform safely and effectively.

Healthcare providers may help determine whether opioid use would pose a safety risk. Safety concerns will only justify a suspension of duties or other adverse action if the risk rises to the level of a direct threat, which means a significant risk of substantial harm to the employee or others that cannot be eliminated or reduced to an acceptable level with a reasonable accommodation. The EEOC document for healthcare providers states that the providers should describe relevant medical events or behaviors that could occur on the job, along with the probability that they will occur.

If an employer determines that an employee's legal use of opioids will interfere with the employee's safe and effective job performance, the employer should provide a reasonable accommodation to the employee if possible, including potentially changing the employee's work schedule to accommodate treatment, transferring the employee to another position, or holding the employee's position open while the employee takes leave. Employers must also provide reasonable accommodations to employees who have recovered from opioid addiction but need an accommodation to prevent relapse, such as time off to attend a support group meeting.

The EEOC guidance reminds employers that legal opioid use related to a disability, including opioid addiction, must be accommodated under the ADA. Further, the guidance explains that determination of a safety risk must be based on evidence, potentially including information from a healthcare provider.

Sourced from [National Law Review](#).

FEW receives information from the following sources and contacts: Federal News Network, CNN, National Law Review, and FedWeek.