WILLCOX SAVAGE

Employment Law Outlook

Fall 2020

Update on Virginia's Emergency Standard and Return to Work Guidance

Matthew K. Sarfan

As we reported in our previous issue, the Virginia Department of Labor and Industry released the Emergency Temporary Standard for Infectious Disease Prevention to combat the SARS-CoV-2 virus and COVID-19 in the workplace (the Standard). It went into effect on July 27. Employee training on the standard was required by August 26, and the implementation of an Infectious Disease Preparedness and Response Plan (and training on the plan) was required by September 25, 2020. We have been working with clients on compliance with the standard for the past few months, and if you have not prepared required policies or training, it is not too late to implement these documents.

Our previous article discussing the general requirements of the Standard can be found here.

Return to Work Guidance

We have received questions from clients regarding how quickly employees may return to work under the Standard, as well as under the ever-changing CDC guidance. While the answer to these questions often require a nuanced analysis of the circumstances, the CDC and DOLI have recently updated their guidance to allow for a somewhat quicker return to work, in some circumstances.

Under Virginia's Standard, return to work procedures vary based on whether the employee is symptomatic. For employees who develop symptoms (whether they have a confirmed test or not), employers may use a Symptom-Based approach or a Test-Based approach. The Symptom-Based approach does not allow employees to return to work until (1) 72 hours have passed since recovery, and (2) at least 10 days have passed since the symptoms first appeared.

(CONTINUED ON PAGE 2)

DOL Issues Interim Final Rule on Lifetime Income Illustrations

Ingrid A. Watson

Corina V. San-Marina

On August 18, 2020, the Department of Labor (DOL) released an interim final regulation requiring 401(k) and other ERISA defined contribution plan sponsors to provide participants with an annual lifetime income disclosure, regardless of whether annuities/lifetime income investment options are offered in the plan. The idea is that seeing lifetime income illustrations as part of the benefit statement will allow participants to better understand both the progress that they are making in saving for retirement, and how the amount in their plan account translates to potential retirement income.

Plan administrators will be required to provide to participants at least yearly two lifetime income illustrations. The illustrations are estimated monthly payments based on a single life annuity and qualified joint and 100% survivor annuity, regardless of whether the participant is single or married.

For purposes of providing the lifetime income illustrations, plan administrators must use the following assumptions to convert a participant's account balance:

- Assumed commencement date and age: Payments are assumed to begin on the last day of the benefit statement period, and the participant is assumed to be age 67 on that date unless the participant is older than 67, in which case the participant's actual age must be used.

- Assumed marital status and amount of survivor's benefit: The participant is assumed to be married

(CONTINUED ON PAGE 3)

Is It Time To Consider Employee Arbitration in Virginia?

David A. Kushner

Matthew K. Sarfan

As we have reported in the last two issues, the Virginia Legislature recently passed a litany of new employment protection laws. The new laws cover a variety of topics including new protections for workplace discrimination, non-competes, wage theft, employee misclassification, and a broad whistleblower protection law. As a result of these new laws, most employment disputes in Virginia are likely to end up in Virginia state court, where it is nearly impossible to obtain early dismissal of an employment claim. Not only will these increase the costs of litigation, but the risks will also go up substantially (when compared to a federal claim litigated in federal court), since nearly every case will have to be either resolved, or litigated before a jury. One way Virginia employers can limit these risks going forward is to require employees to sign mandatory arbitration agreements.

Employers have increasingly used arbitration agreements in recent years, especially in jurisdictions with broad state and local employment discrimination statutes. When used correctly, arbitration can decrease the cost and overall risk of litigation by removing the litigation from a jury and placing the arbitrated dispute on a faster schedule than may be possible in many courts.

However, arbitration agreements have been somewhat less common in Virginia. This can be attributed to a number of factors, including:

- Federal courts in Virginia were historically considered to be relatively employer-friendly;
- The short litigation window in the so-called “Rocket Docket” federal courts in Alexandria, Richmond, Newport News and Norfolk (where trials often occur within 6 months of filing); and
- The reputation of arbitration as being less likely to grant early dismissal of a matter.

(CONTINUED ON PAGE 4)

Update on Virginia's Emergency Standard and Return to Work Guidance

(CONTINUED FROM PAGE 1)

The Test-Based approach does not allow employees to return until (1) resolution of fever without medication and improvement of respiratory symptoms and (2) the negative result of at least 2 consecutive tests collected greater than or equal to 24 hours apart.

For employees who had a positive test, but remain asymptomatic, employers may use a Time-Based approach, or the same Test-Based approach as above. The Time-Based approach does not allow employees to return until 10 or more days have passed since the first positive test.

The CDC recently amended its guidance regarding the Symptom-Based approach -- stating that employees may not return to work until 24 hours have passed since recovery and (2) at least 10 days have passed since the symptoms first appeared. This would allow employees to return up to 48 hours faster than before. This change led to confusion regarding how quickly symptomatic employees can return to work under the Virginia Standard—which originally required a 72 hour recovery waiting period. Fortunately for employers who are particularly short-staffed due to the pandemic, the Virginia Department of Labor and Industry recently released new guidance on the matter. The DOLI explained that employers may follow the new 24 hour recovery period, as opposed to the 72 hour period.

Note that if you decide to amend your return to work policy to mirror the CDC guidance, you need to inform your employees of the change. You will also need to include the change in your Infectious Disease Preparedness and Response Plan (if you have high risk employees, or medium risk employees and eleven or more employees) to maintain compliance with the Standard.

If you have any questions regarding this change, or any other questions regarding the Standard, feel free to give us a call. ■

DOL Issues Interim Final Rule on Lifetime Income Illustrations

(CONTINUED FROM PAGE 1)

to a spouse of the same age, regardless of actual marital status or age of spouse, and the benefit payable to the surviving spouse is assumed to be the same as the monthly payment that is payable during the participant's lifetime.

- Assumed interest rate: Assumed monthly payments must be calculated using the 10-year constant maturity Treasury rate as of the first business day of the last month of the benefit statement period.

- Assumed mortality: Assumed monthly payments must be calculated based on the gender neutral mortality table published by the IRS in Code Section 417.

In addition, the disclosure must also include the following information "written in a manner calculated to be understood by the average plan participant:"

- The commencement date and age assumptions (including how commencing benefits earlier/later could reduce/increase monthly benefit payments).

- An explanation of what a single life annuity and qualified joint and 100% survivor annuity are and how they work.

- The assumed interest rate, mortality, and marital status.

- The fact that the illustrations are estimates only and do not constitute guarantees.

- The fact that actual monthly payments may "vary substantially" from the illustrations, and will depend on numerous factors.

- The fact that the assumed monthly payment amounts are fixed amounts that will not increase for inflation.

- The assumption that the participant is 100% vested in his/her account balance and will repay any outstanding plan loans.

The guidance provides special rules for defined contribution plans that offer in-plan distribution annuities through a contract with a licensed insurer and plans that allow participants to purchase deferred income annuities. Plans that offer in-plan annuities may either use the DOL assumptions or may base the lifetime income illustrations on the actual terms of the contract, except for the assumptions relating to commencement date and age, marital status, and age of the spouse.

If the plan offers participants the ability to purchase a deferred income annuity, the amounts payable under the deferred annuity must be separately disclosed, along with information regarding the date payments will commence and the age of the participant at that time, the frequency of payments, survivor benefits and whether payments are fixed or adjusted for inflation. For the remainder of the account, the regular lifetime income disclosure rules apply.

The DOL has provided model language for each of the required explanations. The model language can be modified to a very limited extent, but the DOL cautioned that the language must remain "substantially similar in all material respect" to the model language.

The DOL has provided model language for each of the required explanations. The model language can be modified to a very limited extent, but the DOL cautioned that the language must remain "substantially similar in all material respect" to the model language. Plan administrators who use the prescribed assumptions and the model language will be relieved from liability against participants who are later disappointed because they are unable to purchase equivalent monthly payments or view such illustrations as a type of investment advice.

Implementing the regulation may require many recordkeepers and other service providers to develop new systems capable of making the required disclosures. Additionally, recordkeepers that currently provide lifetime income estimates will need to determine if they want to change their estimates in order to conform to the regulation or, alternatively, provide both sets of estimates. Absent any additional action by the DOL, the rule will become effective one year after it is published in the Federal Register. The DOL indicated that it intends to issue a final rule before the effective date incorporating any comments received in response to the interim final regulation.■

WILLCOX SAVAGE
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510

Is It Time To Consider Employee Arbitration in Virginia?

(CONTINUED FROM PAGE 2)

In addition, arbitrators are costly (while judges are free), and the arbitration costs are typically borne by the employer.

Now that most Virginia employment litigation will be in state court where litigation will be protracted and expensive, we recommend that employers speak with their employment counsel to determine if mandatory arbitration agreements make sense in the context of your business. If so, there are a number of other considerations to be analyzed, such as where the arbitration should take place, who selects the arbitrator, which procedural rules will apply, and whether to only require arbitration for newly hired employees. If you have any questions about arbitration, please feel free to contact a member of our employment law team. ■

CONTACTS

Labor & Employment Law

David A. Kushner ● dkushner@wilsav.com

William M. Furr ● wfurr@wilsav.com

Gregory A. Giordano ● ggiordano@wilsav.com

Christopher A. Abel ● cabel@wilsav.com

James B. Wood ● jbwood@wilsav.com

Matthew K. Sarfan ● msarfan@wilsav.com

Caine J. Caverly ● ccaverly@wilsav.com

Employee Benefits

Cher E. Wynkoop ● cwynkoop@wilsav.com

David A. Snouffer ● dsnouffer@wilsav.com

Ingrid A. Watson ● iwatson@wilsav.com

Corina V. San-Marina ● csanmarina@wilsav.com

Immigration

James B. Wood ● jbwood@wilsav.com