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Unemployment Compensation and Continuation of Coverage for School Districts

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Practice Area: Labor and Employment & School Law

On April 16, 2020, Governor Evers extended the State's Emergency Safer At Home Order through May 26, 2020, and shut public schools down for the remainder of the academic year. Now that school districts have clarity on the fate of the school year, administrators are seeking counsel on steps that they can take to cut costs while retaining quality employees. This FAQ explores several of those questions, particularly as they relate to Unemployment Compensation ("UC") benefits and continuation of health care and retirement benefits.

Q: If a school district temporarily lays-off or furloughs employees for the duration of the current academic year, what UC benefits would employees be eligible for at present?
A: If a school district were to temporarily lay-off employees for the duration of the academic year, employees would be eligible for state UC benefits and an additional $600 per week under the CARES Act. (This $600 per week benefit is known as Federal Pandemic Unemployment Compensation ("FPUC")). The FPUC benefit is 100% federally funded, and a school district cannot be charged for it. Moreover, as a governmental employer, a school district would be eligible for up to 50% reimbursement for state UC benefits paid to employees through December 31, 2020 under the CARES Act.

Q: Is Wisconsin's one-week waiting period still in effect?
Wisconsin recently passed legislation to waive the one-week waiting period for employees. The CARES Act includes a provision that provides federal funding to states that waive the one-week period that employees would ordinarily have to wait to receive UC benefits. As a result, employees will be immediately eligible for state UC benefits as well as the $600 per week FPUC benefit.

Q: If a school district reduces an employee's full-time hours, as opposed to implementing a layoff, what benefits would be available to employees?
A: Under state law, an employee is not eligible for UC benefits for weeks where the employee receives wages for 32 hours or more per week, or earns $500 or more per week. If hours for an employee fall below 32 hours per week, the employee is likely to be immediately eligible for UC benefits under state law (provided the employee has earned less than $500 in the week) – as Wisconsin has waived the first week waiting period for UC benefits. FPUC is also tied to eligibility for state UC benefits, so an employee receiving UC benefits for a reduction in work – partial unemployment – would also receive the $600 per week benefit.

Q: If a school district reduces an employee's hours and allows the employee to use Paid Time Off (PTO) for the remaining hours not worked, would that affect the employee's eligibility for UC benefits?
A: PTO is considered wages under state law. If an employee receives wages for 32 hours or more of work per week, the employee will be ineligible for UC benefits under state law. Therefore, if an employee's hours are reduced to 30 hours, but the employee decides to use 5 hours of PTO for that week, the employee would not qualify for UC benefits. Because FPUC is tied to eligibility for state UC benefits, such employee would not be eligible for the $600 per week benefit.

Q: If a school district completely or partially reduces an employee's hours such that the employee is eligible for UC benefits, would a school district be able to maintain insurance benefits for the employee during a layoff? Will the maintenance of insurance benefits for the employee affect the employees' ability to obtain the $600 benefit?
A: Because health insurance contributions are excluded from the definition of wages for the purposes of calculating UC benefits, a school district would likely be able to continue to maintain health insurance benefits, and an employee would still be eligible for UC benefits, including the $600 FPUC benefit, without any deductions from the weekly benefit rate of the employee. However, employee insurance coverage eligibility rules are subject to the insurer's policies, so those plans, policies and documents should be reviewed in order to determine whether continued coverage for a given employee is possible.

Q: Is a school district obligated to apply hours reductions uniformly to all employees?
A: Absent a Work-Share Plan (discussed below), state law does not require hours reductions to be conducted uniformly. So long as hours reductions are based on legitimate, non-discriminatory reasons that do not constitute disparate treatment or disparate impact on a protected group of employees, a school district has discretion, based on its legitimate operational and business needs, to fashion layoffs based on the availability of work. Should a school district have concerns that a possible issue of disparate treatment or disparate impact on a protected classification may be involved, the district should proceed with caution and seek further legal advice to reduce risk.

Q: What is a Work-Share Plan?
A: A Work-Share Plan, also known as (Short-Term Compensation or "STC"), is a program designed to help employers reduce work hours in order avoid or minimize furloughs and layoffs. Employees whose hours are reduced under an approved work-share plan may receive UC benefits that are pro-rated for the partial reduction of work. An STC allows qualifying employers to reduce employee hours while still allowing the employees to be eligible for state UC benefits in situations where the employees would ordinarily be disqualified from receiving UC benefits – such as where an employee worked 32 hours or more per week, or earned $500 or more in the week. Despite these advantages, employers may lose discretion and flexibility under an STC because hours must be reduced uniformly in the work unit to which the STC applies, the employer may not reduce hours below 60% of hours regularly worked, and hours reductions must be consistent from week to week.

Q: Does a school district have financial responsibility for UC benefits paid pursuant to an approved STC program funded by the CARES Act?
A: No. The CARES Act provides 100% federal funding for benefits paid pursuant to an approved STC program in states that have such programs. Wisconsin has an STC program administered by the Department of Workforce Development ("DWD"). These benefits will be federally funded until December 31, 2020 for a maximum of 26 weeks. Employees are also eligible to receive the $600 weekly FPUC benefit. UC benefits paid pursuant to an approved STC program will not be the financial responsibility of a school district.

Q: What UC benefits is an employee entitled to under an approved STC program?
A: An employee whose hours are reduced through an STC program will receive an amount equal to the employee's regular UC benefit multiplied by the employee's proportionate reduction in hours worked for that week as a result of the STC program. For example, a full-time employee who works 40 hours per week and earns $16.00 per hour (and is otherwise eligible for benefits) would have a weekly benefit rate of $370.00. A 20% reduction in hours (40 hours – 32 hours = 8 hours) would result in a weekly benefit of $74.00 under an STC program ($370 x .20 = $74.00).

Q: What are the requirements of an STC program?
A: Wisconsin relaxed the requirements for an STC program through December 31, 2020. An STC program must include a minimum of at least two Wisconsin employees. Hours reductions must be conducted equitably based on a set percentage of 10%, but not more than 60%, of the normal hours worked per employee per week and must remain consistent every week. Participating employees must be regularly employed by the employer. Full-time, part-time, salaried and exempt employees can be included in an STC program. Any reduction in hours is calculated against an employee's normal weekly work hours.

Q: Are UC benefits under an STC program the same as regular UC benefits (without an STC program)?
A: While the same formula is used to calculate the weekly benefit rate under both STC programs and with respect to regular UC benefits, STC programs allow employees to obtain UC benefits even if they work 32 hours a week or more. Absent an STC program, employees who work 32 hours or more during a week are ordinarily ineligible for UC benefits for that week. However, under an STC program, an employee whose hours are reduced from 40 to 32 hours would still qualify for UC benefits. For example, a full-time employee who works 40 hours per week and earns $16.00 per hour (and is otherwise eligible for benefits) would have a weekly benefit rate of $370.00. A 20% reduction in hours (40 hours – 32 hours = 8 hours) would result in a weekly benefit of $74.00 under an STC program ($370 x .20 = $74.00). Without an STC program, this employee would not receive any UC benefits as a result of the employee working 32 hours per week. Additionally, employees would ordinarily be ineligible for UC benefits if they earned more than $500 in wages per week, but an employee earning more than $500 in wages per week may be entitled to benefits under an STC program.

Q: Do employees continue to receive health insurance and retirement benefits under an STC program?
A: Yes. A school district must maintain health insurance coverage under the same terms and conditions as if the employees were not included in the STC program.

Q: How does our school district apply for an STC program?
A: A school district can fill out and submit an application through the DWD. The application is available at https://dwd.wisconsin.gov/uitax/workshare.htm.

Q: If a school district lays-off or reduces an employee's hours prior to the end of the current academic year, will the school district be required to pay the employee's UC benefits during the summer after the end of the 2019-2020 academic year?
A: Maybe. Under state law, the general rule is that UC benefits are not payable between academic years for school year employees of public and private education institutions *if the employee has reasonable assurances of similar work in the following term*. However, some UC case law suggests that benefits may continue for a school employee during the summer if the employee was not scheduled for work prior to the summer, for example, due to layoff. We are unaware of any definitive case that answers the question and no specific guidance has been provided yet from the DWD under the current crisis situation. Those school districts that elect to layoff a school year employee now should consult with legal counsel to determine how to best position the school district to minimize UC liability during the summer.

Q: What are reasonable assurances for the purposes of UC benefit eligibility between academic years?
A: Where the terms and conditions of work to be performed in the subsequent academic year or term are reasonably similar to the terms and conditions of the work the employee performed in the prior academic year, a school district may provide reasonable assurances of continued employment to an employee. School districts should be prepared to document in reasonable assurances by way of letter to an employee to include: (1) the type of work performed by the employee in the prior year; (2) the kind of work the employee will be performing in the next academic year or term; (4) job titles; (3) the terms and conditions of work to be performed; (4) the relevant rates of pay; (5) the dates the prior academic year or term ended; (6) the starting date of the next academic year or term; (6) an affirmative statement of a reasonable assurance of similar work in the next academic year or term. A school district, however, must exercise caution in the language utilized in a reasonable assurance letter to avoid creating a property interest in employment for such employees.

Q: What factors are considered in determining whether work is reasonably similar for the purposes of determining reasonable assurances?
A: The DWD recently amended its administrative rules to conform to the federal standards specified by the U.S. Department of Labor ("DOL"). See Unemployment Insurance Program Letter 5-17. As such, work is reasonably similar if the employee: (1) will earn at least 90% of the amount the employee earned in the academic year or term which preceded the weeks of unemployment; and (2) the employment involves substantially the same skill level and knowledge as the employment in the academic year or term which preceded the weeks of unemployment.

Q: Will a school district be able to provide valid reasonable assurances to its employees that reasonably similar work will be available when the 2020-2021 academic year commences under the current circumstances of the Safer-at-Home Order?
A: The answer to this question is unclear. K-12 school buildings are closed under the Safer-at-Home Order for the remainder of the 2019-2020, except for limited, non-instructional functions. Nevertheless, many school districts are providing virtual/remote instruction to students and many staff members remain employed to provide for the essential functions of school districts. While Wisconsin has announced that K-12 schools will be opening under the Badger Bounce Back Program Phase One, there are no definite time targets for when Phase One of the Badger Bounce Back Program will begin, as the timeline is based on COVID-19 testing and other health criteria. Under these circumstances, employee future earnings for reasonably similar work would be contingent on work availability, as well as budget - factors which may be unknown at this time. It may be difficult, therefore, to assure employees that they will earn 90% of what they earned the year before, as required by the DWD and the DOL in order to constitute a valid reasonable assurance. As such, a school district's reasonable assurances may be considered "contingent" reasonable assurances, which may not be valid, according to the current DOL guidance. It remains to be seen how the DWD will address the issue of reasonable assurances.

Q: What if circumstances change after a layoff in such manner that it becomes reasonably probable that schools will not re-open for the 2020-2021 academic year?
A: According to DOL guidance, if a claimant who originally had a valid reasonable assurance subsequently is determined to not have a reasonable assurance, the claimant may be eligible for UC benefits due to changed circumstances. Accordingly, if the Safer-at-Home Order is extended into the 2020-2021 academic year, school district employees on layoff may become eligible for UC benefits over the summer. (For weeks of UC benefits paid through July 31, 2020, this would include the $600 FPUC benefit.) Generally, employees providing services in a professional capacity, such as teachers and administrators, would not be eligible for retroactive payment of UC benefits based on changed circumstances. Instead, they would be eligible prospectively – from the date of the changed circumstances. However, non-professional employees would likely be entitled to both retroactive and prospective UC benefits commencing from the end of the 2019-2020 academic year.

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