CLIENT ALERTS & INSIGHTS

Bipartisan Majority of House Approves New Emergency Paid Leave Requirements for Private Employers with Fewer than 500 Employees – Senate Expected to Vote March 16

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Early in the morning on March 14, 2020, the House of Representatives passed the **Families First Coronavirus Response Act** with broad bipartisan support. The bill is not yet law; it must be approved by the Senate and then signed by President Trump. However, President Trump has announced, via Twitter, that he "fully support[s]" the Act.

The House-passed version addressed a number of topics relating to the coronavirus pandemic, including emergency funding for several nutrition programs and emergency transfers to state unemployment funds. Of paramount interest to employers, however, are the Act's provisions regarding paid leave.

As currently written, the Act's paid leave requirements **do not** apply to employers with 500 or more employees. For employers with fewer than 500 employees, the Act imposes two paid leave requirements.

1. Expansion of FMLA Leave

The Act amends the Family and Medical Leave Act ("FMLA") to provide for as many of 12 weeks of job-protected leave for employees who are unable to work because they must:

- Comply with a quarantine, which the Act describes as a recommendation or order by a public official having jurisdiction or a health care provider on the basis that the physical presence of the employee on the job would jeopardize the health of others because of the exposure of the employee to coronavirus or because the employee is exhibiting symptoms of coronavirus;
- Care for a family member subject to a quarantine (and family member is more expansive than under the FMLA, can include someone for whom the employee is next of kin); or
- Care for a son or daughter under 18 years old if the school or place of care for the child has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

Employer Eligibility: Private employers with fewer than 500 employees, and most public employers. For smaller employers, this bill could introduce FMLA coverage to their workplace. In the bill's

current form, the expansion would be specific to these amendments only. There is language allowing regulations to exclude emergency responders and/or businesses with less than 50 employees where the requirements would jeopardize that business as a going concern. But at this time, no such exclusions apply.

Employee Eligibility: An employee who has been employed for at least 30 calendar days. Note that this is a much lower threshold than the 12 month/1,250 hour tenure requirement that otherwise applies to FMLA leave.

Job Restoration: The FMLA's job restoration requirements generally apply, with limited flexibility for employers with less than 25 employees.

Paid Leave Requirement: Unlike normal FMLA leave, leave lasting longer than 14 days must be paid at two-thirds an employee's regular rate of pay. In more detail:

- The first 14 days of leave may be unpaid. During this unpaid 14 day period, an employee may elect, but cannot be required, to substitute any accrued vacation leave, personal leave, or medical or sick leave for the unpaid leave.
- After 14 days of leave have been taken, the employer must provide paid leave. Paid leave must be an amount that is not less than two-thirds an employee's regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work. Paid leave must continue until the qualifying condition no longer exists, or after twelve weeks of leave have been taken.
- **Effective Date:** The Act takes effect not later than 15 days after the date the Act is enacted.
- **Sunset:** The paid family leave requirement expires on December 31, 2020.

2. Emergency Sick Leave

Complementing the FMLA amendment, the Act requires emergency sick leave for employees who cannot work for any of the following reasons:

- To self-isolate because the employee is diagnosed with coronavirus;
- To obtain a medical diagnosis or care if such employee is experiencing the symptoms of coronavirus;
- To comply with a quarantine, which the Act describes in the same fashion as it does with the FMLA amendment (see above);
- To care for a family member (same expansive definition) who is self-isolating because the family member has been diagnosed with coronavirus or is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care;
- To care for a family member subject to a quarantine; or
- To care for the child of the employee if the school or place of care has been closed, or the child care provider is unavailable, due to coronavirus.

Employer Eligibility: Private employers with fewer than 500 employees, and most public employers.

Employee Eligibility: The full allotment of paid sick time provided for by the Act must be available for immediate use by an employee, regardless of how long the employee has been employed by the employer.

Allotment of Sick Leave: For full-time employees, 80 hours. For part-time hours, emergency sick leave is the number of hours an employee works, on average, over a 2-week period.

No Carryover: Emergency paid sick time provided by the Act does not carry over from one year to the next.

Must be in Addition to Existing Policies: If an employer has a pre-existing policy providing for paid sick leave, emergency sick leave under the Act must be made available to employees in addition to such pre-existing leave. An employer may not change its paid leave policy on or after the date the Act is enacted to avoid being subject to this requirement. Further, an employee must be allowed, if they so choose, to use the sick leave under the Act before using any other form of paid leave.

Pay Rate: Paid sick leave must be paid at the employee's regular rate of pay, unless the leave is related to the care of a family member, in which case sick leave must be paid at two-thirds the employee's regular rate.

Effective Date: The Act takes effect not later than 15 days after the date the Act is enacted.

Penalties: A non-complying employer will be in violation of the FLSA.

Sunset: The emergency paid sick leave requirement expires on December 31, 2020.

Cost Mitigation: Tax Credits

To help offset the cost of paid leave, the Act provides for credits against quarterly payroll taxes imposed on the employer. The credits are capped at: $200/day for employees using paid family leave; $511/day for employees using paid sick leave to care for themselves, and; $200/day for employees using paid sick leave to care for family members. The paid family leave credits are further capped at an aggregate of $10,000 per employee. The Treasury Department will have to issue regulations and guidance to employers to further explain how this credit will be claimed.

Key Takeaway

If you are an employer with fewer than 500 employees, you are likely going to be required to provide paid leave to employees who are unable to work because of circumstances relating to the Coronavirus pandemic. Employers should be prepared to implement these requirements in short order.

For more information on the Families First Act, contact a member of the firm's Labor & Employment Practice Group.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

