CLIENT ALERTS & INSIGHTS

UPDATE – Benesch COVID-19 Resource Center: Revised Families First Coronavirus Response Act Narrows the Scope of Emergency FMLA Expansion and Paid Sick Leave Benefits

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[Editor's Note: President Trump signed the Act in the evening of March 18. Per guidance published by the Department of Labor on March 24, the Act is effective April 1, 2020. Affected employers must be prepared to implement the Act's leave programs by this date.]

Early in the morning on March 14, 2020, the House of Representatives passed the **Families First Coronavirus Response Act** with broad bipartisan support. The Act introduced paid FMLA leave and paid sick for employers with fewer than 500 employees. After the Act was passed by the House, it went through a series of "technical corrections" negotiated by Speaker Pelosi and Secretary Mnuchin. The revised Act is now being considered by the Senate.

While the official characterization of the edits made is "technical", the changes are significant:

- **Emergency FMLA Leave Only for Child Care Disruption**. The original text of the Act provided for multiple conditions supporting up to 2 weeks of unpaid and 10 weeks of paid emergency FMLA leave, including an employee's quarantine. The revised text only provides for one qualifying condition: if an employee is unable to work (or telework) in order to care for a child if the child's ordinary place of care (including a school) is unavailable.
- **Emergency FMLA Leave and Paid Sick Leave Are Financially Capped.** The requirement for up to 10 weeks of paid FMLA leave and 80 hours of sick leave remain. However, paid emergency FMLA leave is capped at $200/day and $10,000 in the aggregate, and paid sick leave is capped at $200 or $511/day and $2,000 or $5,110 in the aggregate depending on the condition supporting the request for leave. These changes harmonize the potential leave liability with the tax credits provided for in the Act. Subject to the specific conditions of forthcoming Treasury Department regulations, 100% of the emergency FMLA and paid sick leave wages may be reimbursed via payroll tax credits.
- **Qualifications for Paid Sick Leave are Tightened**. Although there are now six qualifying conditions for paid sick leave, the definitions of those conditions have been more narrowly defined.

A significant feature that did not change: the Act's paid leave requirements continue not to apply to employers with 500 or more employees. Only those employers with fewer than 500 employees are impacted. Here is our summary of the requirements in the Act as presently being considered by the Senate:

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 (or telework) because they must:

- 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. (Earlier versions of the Act provided for additional qualifying situations and did not provide for telework).

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 fewer than 25 employees.

Paid Leave Requirement: Unlike FMLA leave under the 1992 Act, leave lasting longer than 10 days must be paid at two-thirds an employee's regular rate of pay. In more detail:

- The first 10 days of leave may be unpaid. During this unpaid 10 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 10 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; provided, however, that such paid leave is capped at $200/day. Paid leave must continue until the qualifying condition no longer exists, or after twelve weeks of leave have been taken. Finally, there is a $10,000 cap on the aggregate amount of paid leave paid to an employee.

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.

1. **Emergency Sick Leave**

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

A. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

B. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

C. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

D. The employee is caring for an individual who is either (1) subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

E. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions;

F. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

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

No Payout at Termination: Paid sick time not used at the time of an employee's termination, resignation, or retirement does not need to be paid out to the employee.

May be Used Before Other Paid Leave: Employers may not require an employee to use other paid leave provided by the employer to the employee before the employee uses paid sick time provided for by the Act.

Pay Rate: Paid sick leave must be paid as follows:

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At the employee's regular rate, subject to a maximum of $511 per day and $5,110 in the aggregate for qualifying conditions (A), (B), or (C) described above.

- At two-thirds the employee's regular rate, subject to a maximum of $200 per day and $2,000 in the aggregate for qualifying conditions (D), (E), or (F) described above.

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 in an amount equal to 100 percent of the qualified family leave wages and paid sick leave wages paid by an employer, subject to the requirements of forthcoming Treasury Department regulations.

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 certain 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.

