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## **FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

### **I. INTRODUCTION**

On March 18, 2020, H.R. 6201, the Families First Coronavirus Response Act was signed into law. Of particular interest to employers, the Act has two components of paid emergency leave for impacted employees – Public Health Emergency Leave and Emergency Paid Sick Leave. Employers will be reimbursed for some of the expenses associated with the paid leave through payroll tax credits. Within 15 days of enactment (April 2, 2020) employers will be subject to the following obligations, all of which are presently scheduled to sunset on December 31, 2020.

### **II. EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

#### ***A. Expanded Paid Family Leave***

The Emergency Family and Medical Leave Expansion Act amends FMLA to provide up to 12 weeks of emergency leave for qualified individuals who work for employers who employ fewer than 500 employees.

#### ***B. Qualifying Leave***

To qualify for Public Health Emergency Leave, an individual must have been employed with the employer for at least 30 days and require time off to care for the employee's child who is under 18 years of age if the child's school or place of care has been closed, or the childcare provider of the son or daughter is unavailable, due to a public health emergency (an emergency with respect to COVID-19 declared by a Federal, State, or local authority).

An employee taking Public Health Emergency Leave must provide advance notice as soon as practicable of a need for leave under the temporary provision when the need for leave is foreseeable.

#### ***C. Exclusions***

The Act provides that an employer may exclude employees who are healthcare providers or emergency responders from the Public Health Emergency Leave coverage.

***D. Unpaid Leave***

The first 10 days of leave from work for a public health emergency can be unpaid. If the employee has available paid leave (accrued vacation leave, personal leave, or other medical leave), the employee may elect to substitute available paid leave. However, the employer cannot require the substitution of paid leave.

***E. Pay Caps***

After 10 days of leave, employers must continue paid Public Health Emergency Leave at a rate of no less than two-thirds of the employee's usual rate of pay. The Act limits the amount of required paid leave to no more than \$200 per day and \$10,000 in the aggregate. Benefits would continue for the entire leave period.

***F. Job Protections***

As with traditional FMLA leave, the leave is job-protected, which means that an employer must return the employee to the same or equivalent position upon his or her return to work. There is an exception, however, to the job-protection provisions for employers with fewer than 25 employees if the employee's position does not exist after FMLA leave due to an economic downturn or other operating conditions that affect employment caused by the COVID-19 pandemic.

Specifically, an employer with fewer than 25 employees would not have interfered with the employee's FMLA rights to restoration if the following conditions are met:

- i. The employee took Public Health Emergency Leave;
- ii. The position held by the employee when the leave commenced no longer exists due to economic conditions or other changes in operating conditions of the employer (a) that affect employment; and (b) are caused by a public health emergency during the period of leave;
- iii. The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and
- iv. If the reasonable efforts of the employer fail, the employer makes reasonable efforts during the period to contact the employee if an equivalent position becomes available within one year from the date on which the qualifying need related to a public health emergency concludes; or the date that is 12 weeks after the date on which the Public Health Emergency Leave begins, whichever is earlier.

***G. Private Employers With Less Than 50 Employees***

Employers with fewer than 50 employees are excluded from civil FMLA damages or equitable relief in an employee-initiated lawsuit.

### **III. EMERGENCY PAID SICK LEAVE**

There are also new paid sick leave requirements that apply to all employers with fewer than 500 employees.

#### ***A. Application and Amount***

Private employers must provide up to 80 hours of emergency paid sick leave to full-time employees and the average number of hours the employee works over a two-week period to part-time employees. The paid leave benefit is available for immediate use, regardless of how long the employee has been employed by the employer.

The paid sick leave may be used under the following circumstances:

- i. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- ii. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- iii. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
- iv. The employee is caring for an individual who is subject to an order as described in subparagraph (i) or has been advised as described in subparagraph (ii)
- v. 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 childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
- vi. The employee is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

#### ***B. Pay Caps***

Paid leave shall not exceed \$511 per day (\$5,110 in the aggregate) where leave is taken for reasons related to the employee's own health, exposure, or quarantine under subparagraphs (i), (ii), and (iii) set forth above; and \$200 per day (\$2000 in the aggregate) where leave is taken for reasons (iv), (v), or (vi), set forth above.

#### ***C. Exclusions***

Employers have the ability to exclude an employee who is a healthcare provider or emergency responder from these benefits.

#### ***D. Interaction with Other Leave Provided By Employer***

The paid sick leave required under the law must be provided *in addition* to whatever the employer already provides. Employers may not require employees to exhaust other employer-provided paid leave benefits before using Emergency Paid Sick Leave and may not amend their paid leave policies to make the benefits run concurrently. The paid sick leave will not carry over from one year to the next and is not considered an earned

benefit that must be paid out upon separation (like PTO or vacation). **The availability of paid sick time provided under this provision ceases as soon as the employee starts their next scheduled shift.**

*E. Possible Exemptions*

Under both acts, the Secretary of Labor has the authority to issue regulations that would exempt small businesses with fewer than 50 employees from the Public Health Emergency Leave obligations, and the paid leave provisions related to childcare outlined in subparagraph (v), at paragraph III, A, above, when the imposition of such requirements would jeopardize the viability of the business as a going concern.

**IV. TAX CREDITS FOR EMERGENCY PAID SICK LEAVE AND PAID FAMILY AND MEDICAL LEAVE**

Under the bill, payroll tax credits are provided to employers to later recoup payments made for Public Health Emergency Leave and Emergency Paid Sick Leave. The tax credit would be equal to 100 percent of the wages paid to an employee under the Acts, up to \$511 per day for personal sick leave, or \$200 per day if the sick leave is to care for a family member or child who must remain at home due to school closings. The total family leave tax credit and employer may receive is capped at \$10,000. Similar credits are provided to self-employed individuals who are responsible for self-employment taxes. Importantly, no tax credits for leave paid under either act will be provided to employers who already receive tax credits for a qualifying leave program under the 2017 Tax Cuts in Jobs Act.

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