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Congress Passes “Families First Coronavirus Response Act” Requiring Most Small to Mid-Size Employers to Offer Paid Leave

In the latest dizzying change caused by COVID-19 (coronavirus), President Trump, late on Wednesday, March 18th, signed the Families First Coronavirus Response Act (the “Act”), as the second major law to address the growing pandemic. This law imposes significant obligations on most small and mid-size employers to provide paid leave to employees, in the form of two new paid leave requirements, and a broad new category of job protected leave under the FMLA, all in relation to certain COVID-19 related needs. Employers will bear the initial burden of paying for any required paid leave, subject to being reimbursed by the federal government, though the reimbursement process may take time, depending on a business's circumstances. The details of this new law, which are summarized below, are critical to understanding an employer's new responsibilities. Our firm is ready to answer any questions on this new law, as well as the other myriad leave laws. The Act takes effect on April 2, 2020, but employers should begin to prepare immediately.

The Act has a number of provisions related to the COVID-19 pandemic, including enhanced federal funding for COVID-19 testing, the requirement of further guidance from OSHA on the crisis, and bolstering unemployment compensation for the States. However, the two provisions applicable to most small and mid-size employers are: (1) a new requirement to provide paid sick leave to employees; and (2) an expansion of the FMLA to provide paid, job protected, family leave related to child care (even to employers and employees not previously subject to the FMLA before). Below is a summary of those two paid leave provisions.

Critically, however, the new paid sick leave and paid family leave expansion laws are not applicable to: (1) any private employers with 500 or more employees on the payroll during 20 or more calendar weeks in 2019 and 2020 (all government employers are fully subject to the Act regardless of size); or (2) any employers who are health care providers or emergency responders. Employers with less than 50 employees may apply for an exemption from the U.S. Department of Labor, but only if it can be shown that providing the paid leave would “jeopardize the viability of the business.” Also, employers are not permitted to force employees to use their company-provided paid time in lieu of either type of paid leave, although employees may opt to do so. Employers subject to multi-employer collective bargaining agreements must also comply with the requirements of the Act.

Paid Sick Leave

The Act establishes a new requirement of ten working days of paid sick leave (“Paid Sick Leave”). The 10 days of Paid Sick Leave is equivalent to 80 hours for full-time employees, but for part-time employees, the number of hours is equivalent to the average number of hours worked over a typical two work-week period. There are five permissible reasons for the Paid Leave, but the maximum compensation for Paid Sick Leave varies depending on the covered reasons for the leave.

To understand this, there are essentially two types of reasons which will qualify an employee for the Paid Sick Leave, which for convenience we have titled “Employee” and “Caregiver” Paid Sick Leave:

- Employee Paid Sick Leave is required for employees who: (1) are subject to a government-ordered COVID-19 quarantine or isolation; (2) were advised by a health care provider to self-quarantine due to COVID-19; or (3) are experiencing symptoms related to COVID-19 and are seeking a medical diagnosis.
- Caregiver Paid Sick Leave is required for employees who: (4) are caring for an individual who is subject to a government-ordered COVID-19 quarantine or isolation, or who was advised by a health care provider to self-quarantine due to COVID-19; or (5) are caring for a son or daughter if a school is closed, or the normal child care provider cannot provide care, due to COVID-19.

The compensation to be paid varies depending on the type of Paid Sick Leave. For Employee Paid Sick Leave, employees receive their full pay up to a maximum payment of \$511 per day (and \$5,110 in the aggregate for the 10 days). For Caregiver Paid Sick Leave, employees receive the lesser of (1) two thirds (2/3) of their full pay, or \$200 per day (and \$2,000 in the aggregate).

The Paid Sick Leave Law requirements are set to expire on December 31, 2020.

Emergency Paid Family Leave

Unlike the Paid Sick Leave, which is a new law, the Emergency Paid Family Leave is an amendment to the federal FMLA limited to the COVID-19 pandemic. All small and mid-size businesses need to comply with the Emergency Paid Family Leave requirement because the FMLA is amended, as it relates to certain COVID-19 related issues only, to apply to all employers with less than 500 employees. So, the FMLA threshold of 50 or more employees within a 75 mile radius is not in effect for the Emergency Paid Family

Leave. In addition, employees need only have worked for an employer for 30 days before becoming eligible for Emergency Paid Family Leave. So, the FMLA threshold of an employee working for at least 12 months and 1,250 hours in the prior year are not in effect for the Emergency Paid Family Leave.

Emergency Paid Family Leave is limited to employees who are caring for a son or daughter if a school is closed due to COVID-19 or if the normal child care provider cannot provide care due to COVID-19. So, the Emergency Paid Family Leave does not apply to the additional circumstances where Paid Sick Leave is available, such as an employee's own health being affected by COVID-19.

Emergency Paid Family Leave is unpaid for the first 10 days (to coincide with the 10 days of Paid Sick Leave, which would provide 100% pay for the first 10 days up to the maximums listed above). After the first 10 days, the employee then receives two-thirds (2/3) of his/her regular pay for the remaining time they remain on FMLA leave for these school-child care-related reasons. The amount of compensation is capped at \$200 per day, and an aggregate amount of \$10,000. This equates to a maximum of 10 workweeks of leave, such that an employee's 12 weeks of FMLA would consist of the first two weeks as Paid Sick Leave, and the remaining ten weeks as Emergency Paid Family Leave.

Employers should keep in mind that the Emergency Paid Family Leave is an amendment to the FMLA. Employees who have exhausted FMLA leave, or do not have their full 12 weeks, would only be entitled to the Emergency Paid Family Leave for the weeks for which they have remaining FMLA leave. Also, the rate of compensation to be used to calculate the Emergency Paid Family Leave is the normal work week, or for variable hour employees, the average hours worked over the prior 6 months (or reasonably expected hours if employed more than 30 days, but less than 6 months).

Job Restoration

Note that employees taking Emergency Paid Family Leave (including the initial 10-day period, such leave which is paid to employees through the Paid Sick Leave law) are subject to job restoration to their same position or to an equivalent position, subject to a limited exception for employers who employ fewer than 25 employees.

Federal Reimbursement to Employers

The Act is a federal stimulus, meaning that employers who pay out Paid Sick Leave or Emergency Paid Family Leave are entitled to be reimbursed by the federal government for 100% of the monies paid. But, the timeframe for reimbursement varies depending on how reimbursement takes place. There are two methods of reimbursement.

First, the easiest and most immediate is through a forgiveness of payroll taxes owed for social security. That is, for whatever is paid out to employees for Paid Sick Leave and Emergency Paid Family Leave, employers are able to offset those amounts against the employer portion of social security taxes that it owes for any of its employees. For example, an employer can forego its obligation to send 6.2% of its employees' gross pay, for any and all employees, up to the amount it has paid out for Paid Leave and Emergency Paid Family Leave. This would result in an almost immediate recoupment of what was paid out.

Second, if the social security tax forgiveness is not sufficient to fully offset the amounts paid, an employer will be reimbursed through a tax refund. This can be done with the annual return for the business. But, it also appears very likely that it will be reimbursed through an employer filing a quarterly estimated tax return. This latter refund method is awaiting further regulations as a result of the Act, but it does appear it will be permitted, rather than awaiting the annual return.

The implications of the Act are enormous and complex. Our firm is still digesting its impact, including the impact on employers who close their doors temporarily or layoff or furlough all or most of their employees. Although the Act is not entirely clear, it does appear that employees who are laid off or furloughed will not be entitled to Paid Leave or Emergency Paid Family Leave. Instead, those employees would be eligible for unemployment compensation (which the Act is also helping to fund by providing funds to the States to help cover the expected crush of claims). We are continuing to analyze the situation, and will provide regular updates.