Insights: Alerts

The "Families First Coronavirus Response Act" Becomes Law

March 19, 2020

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main COVID-19 Task Force page and/or your email for updates.

On Wednesday, March 18, the Families First Coronavirus Response Act, which originated in the U.S. House of Representatives, was passed by the Senate and signed into law by President Trump. Among other things, the Families First Coronavirus Response Act will amend and expand the Family and Medical Leave Act ("FMLA") and will provide mandatory emergency paid sick days for many U.S. workers.

House Speaker Nancy Pelosi (D-Cal.) said the bipartisan effort would protect "the health, economic security, and well-being of the American people while stimulating the economy." Senate Majority Leader Mitch McConnell (R-Ky.) believed the bill was "well-intentioned," but confirmed his plan to keep the Senate open until lawmakers reached agreement on an additional bill – which is currently being drafted. The bill in the Senate currently anticipates offering cash payments for adults and families, additional stimulus funding, more health care funding, and more unemployment aid. We will continue to track this legislation and report on any meaningful updates for employers.

After passing the Senate, President Trump signed the Families First Coronavirus Response Act shortly after receiving it. The law becomes effective "no later than 15 days" after the President's signature (or, no later than Thursday, April 2, 2020), and will be limited in duration (various sections of the law differ in temporal duration). We previously wrote about the legislation's path to becoming a law in greater detail here and here.

We recap the key provisions of the Families First Coronavirus Response Act for employers:

Amendments to the Family and Medical Leave Act

- **Covered Reasons for Leave.** While earlier versions of the legislation included numerous new categories of "covered" reasons for emergency paid- and unpaid-FMLA leave (related to COVID-19, the final draft adds only one very narrow category of a covered reason for leave: "Public Health Emergency Leave." Public Health Emergency Leave is limited to leave required in order to care for an employee's minor son or daughter (under the age of 18) because of a school or daycare closing and, ***only*** where the school or care facility closing means the employee cannot work ***or telework.***

- **Covered Employers.** The threshold for covered businesses/employers has been altered to include those with 1-499 employees. To be clear, this section of the bill does not apply to employers with 500 or more employees. The legislation is silent as to why Congress defined covered employers in this manner.
- **Individual Eligibility.** Eligible employees include both full and part-time employees who have been on the employer's payroll for "at least 30 calendar days." This varies considerably from the 12-month employment and 1,250 hours (during the last 12 months) requirement usually applied to FMLA leave.
- **Exemptions.** The legislation allows the Secretary of Labor to exempt small businesses with fewer than 50 employees where the requirements would jeopardize the viability of the business. Additionally, an employer "of an employee who is a health care provider or an emergency responder" may "elect to exclude such employee from the application of the provisions" amending the FMLA.
- **Paid v. Unpaid Leave.** The first 10 days of COVID-19 related FMLA leave may be unpaid (although an employee has the discretion to use available paid time off, or use the Emergency Paid Sick Leave created by the bill). After the first 10 days, however, the employer must pay the employee for the COVID-19 related FMLA leave at no less than 2/3 of the employee's regular rate of pay for the number of hours the employee would normally work. ***This is capped at $200 per day and $10,000 in total, per employee.***
- **Determining Number of Hours Normally Worked.** Generally, the standard leave calculation is based on the number of hours the employee would "otherwise be normally scheduled to work." Where it would be unclear how many hours a part-time employee would have worked, the legislation includes a "varying schedule hours calculation" procedure.
- **Return to Work.** Just as with traditional FMLA leave, eligible employees will have job protection and must be returned to the same or similar position when they return from emergency leave (although an exception exists to this provision in certain situations for employers with fewer than 25 employees).
- **Anti-Retaliation Provisions.** As might be expected, the section includes anti-retaliation protections for employees who avail themselves of emergency FMLA for COVID-19 related reasons.
- **Tax Relief.** Employers will be able to take payroll tax credits for the "qualified family leave wages" paid under the new law. Only "compensation required to be paid" under the law constitutes "qualified family leave wages." Thus, if an employer pays employees beyond the $200/day and $10,000 total limits set forth, the employer may not receive a payroll tax credit for the payments.

Creation of Emergency Paid Sick Leave Act

- **Covered Reasons for Leave.** The Emergency Paid Sick Leave Act casts a wider net in providing covered reasons for leave. Covered reasons include: employees who are "subject to a Federal, State, or local quarantine or isolation order related to COVID-19;" employees advised by a health care provider to self-quarantine due to concerns related to COVID-19; employees experiencing symptoms of COVID-19 and seeking a medical diagnosis; employees caring for an individual who is subject to an order to quarantine or self-isolate, or advised to do so; employees caring for a son or daughter whose school has closed or is unavailable; and, employees experiencing substantially similar conditions as specified by the Secretary of Health and Human Services. While not explicitly stated, the initial qualifying language may apply to employees whose shifts were eliminated due to Federal, State, or local orders that their employer's business shutter its doors.
- **Relationship to the FMLA Amendments.** An employee can use his/her paid leave under the Emergency Paid Sick Leave Act during the initial 10 days of unpaid leave under the expanded FMLA.

- **Relationship to an Employer's Voluntary Leave Policies.** The second version of H.R. 6201 removed earlier language that prohibited employers from modifying their existing paid leave policies due to the Emergency Paid Sick Leave Act; however, the final law continues to prohibit employers from requiring that employees exhaust paid leave under the employer's policies before receiving paid leave under the Emergency Paid Sick Leave Act. While the original version of the bill explicitly stated that the emergency paid sick leave was in addition to existing leave policies, the version that reached the Senate and was signed by the President is more ambiguous. Until more guidance is available, covered employers should ensure that all eligible employees receive at least two weeks paid sick leave for COVID-19 related issues (paid at full salary for their own COVID-19 related health issues or 2/3 salary if the employee is providing care to a covered relative), and employers should not force employees to take COVID-19 related leave under the Company's voluntary leave policies, but should leave that decision to the eligible employee's discretion.
- **Value of the Paid Benefits.** Under the amendments, ***paid leave is capped at $511 per day and $5,110 in total in the following situations:*** employee is subject to isolation or quarantine due to a federal, state, or local order; employee has been advised by their health care provider to self-quarantine due to COVID-19 related concerns; or, employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis. ***Paid leave is capped at $200 per day and $2,000 in total, in the following situations:*** employee is caring for an individual subject to quarantine or isolation at the order of the government or direction of a physician; or, employee is caring for a son or daughter if the child's regular care provider is unavailable or school or place of childcare has been closed due to COVID-19 precautions.
- **Small Business Exception.** The legislation states that the Secretary of Labor may exempt a business with less than 50 employees from the Emergency Paid Sick Leave Act if complying with it “would jeopardize the viability of the business as a going concern.” The legislation did not provide a framework for obtaining this exception.
- **Tax Relief.** Employers will be able to take payroll tax credits for the wages required to be paid under the Emergency Paid Sick Leave Act. Thus, employers will not receive credits for wages paid above the requirements of the Act.

Tax-Related Provisions in the Families First Coronavirus Response Act

- **Refundable Payroll Tax Credits for Employers.** The legislation provides for refundable payroll tax credits for employers that cover 100% of the compensation that employers are required to pay under the Act. The credits also offset, uncapped, the employer contribution for health insurance premiums for the employee for the period of the leave. This tax credit is offered each calendar quarter for the monies paid in that quarter. As noted above, the credits are capped at the limits set forth in the legislation.
- **Refundable Income Tax Credit for Self-Employed Individuals.** Similarly, the legislation includes a refundable income tax credit for self-employed individuals. This is also capped at the qualified sick leave wages paid and is addressed each calendar quarter.

Emergency Unemployment Insurance Stabilization and Access Act Provisions

- **Funding.** This section of the legislation provides 1 billion dollars in grant funding for unemployment benefits. This legislation anticipates that there may be a number of workers laid-off due to the impact of

COVID-19.

- **Waiting Week.** The legislation suspends the waiting week for eligibility for unemployment benefits by removing the paragraph in the Federal-State Extended Unemployment Compensation Act of 1970 that mandated no federal funds during the first week, even where state law allowed payments in that week. Under the amendments, the legislation provides for temporary federal matching for the first week of extended benefits for states with no waiting week.
- **Notice Requirements.** Employers are required to provide notification of the availability of unemployment compensation to employees at the time of separation from employment. This notification "may be based on model notification language issued by the Secretary of Labor." Additionally, the legislation created a method by which applicants will receive notification from the state at various points regarding their status, including when an application is received, processing, and/or cannot be processed.
- **Access and Application Requirements.** The legislation requires states to make accessible at least two of three ways (in-person, by phone, or online) for laid-off workers to apply for benefits. Further, states are expected to loosen the eligibility requirements for unemployment applications related to COVID-19, and take any steps necessary to ensure adequate resources in periods of high demand.

Should you have any questions about your obligations under the new law, please contact any of the following Kilpatrick Townsend Labor & Employment attorneys:

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