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Employers Must Prepare Now as Legislature Passes Coronavirus Leave Bill

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The following compliance update is provided to you by the Employment Law Group of Hill Ward Henderson:

Last night, President Trump signed legislation designed to provide American workers with relief as Coronavirus continues to spread. Among other things, the Families First Coronavirus Response Act (H.R. 6201) requires all employers with fewer than 500 employees to provide paid sick leave related to Coronavirus.

With the paid leave protections under this new law set to go into effect 15 days from enactment, employers should be aware of the new law's many legal ramifications.

The Emergency Paid Sick Leave Act

Through December 31, 2020, the Emergency Paid Sick Leave Act requires employers with fewer than 500 employees to provide their employees with two (2) weeks of paid sick leave to employees who are unable to work in the workplace **or** remotely for the following reasons:

1. The employee is subject to a quarantine or isolation order from a federal, state, or local governmental authority related to Coronavirus;
2. The employee has been advised by a healthcare provider to self-quarantine as a result of Coronavirus concerns;
3. The employee is experiencing symptoms of Coronavirus and is also seeking a medical diagnosis/testing;
4. To care for an individual who is self-isolating due to any government authority's order or where the individual has been advised by a healthcare provider to do so;
5. To care for the employee's minor son or daughter in the event that the child's school or place of care has been closed, or if the child care provider of such child is unavailable due to Coronavirus; or
6. 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 – likely to occur in regulations to be codified as soon as possible.

Importantly, the new law prohibits employers from requiring an employee to use other paid leave before using the sick leave provided under this new law.

Notably, employers with fewer than 50 employees may seek a waiver from the Department of Labor where these requirements would jeopardize the viability of their business. However, the process for seeking a waiver have not been drafted and are not yet in effect at the time of this advisory.

The required paid sick leave must be paid at the employee's full regular rate of pay when it is used by employees to quarantine or to seek a diagnosis or preventive care for COVID-19. However, the paid sick leave is reduced to two-thirds the employee's regular rate when it is used to care for a family member, to take care of a child whose school has closed, or where a child care provider is unavailable.

While full-time employees are entitled to the full two (2) weeks of leave (i.e., 80 hours), part-time employees are entitled to the "typical number of hours that they work in a typical two-week period."

The paid sick leave is capped at different amounts based on the reason the leave is taken: (a) \$511 per day and \$5,110 in the aggregate for any employee who takes leave for reasons 1 through 3 above; and (b) \$200 per day and \$2,000 in the aggregate for any employee who takes leave for reasons 4 through 6 above.

Once this law goes into effect, employers will be required to make their employees aware of the new legislation by posting a notice created by the Department of Labor in a conspicuous location.

The Emergency Family and Medical Leave Expansion Act

The law also amends the Family and Medical Leave Act ("FMLA") to account for the ongoing outbreak (up and until December 31, 2020). This amendment provides eligible employees with up to 12 weeks of FMLA-protected leave (10 days unpaid and the remainder paid) for certain reasons related to Coronavirus.

Notably, this portion of the Act drastically changes who is eligible to take FMLA leave and what employers are covered. Any employee – both full and part-time – who has been employed for at least 30 calendar days by the employer would be eligible for FMLA leave due to Coronavirus. This expanded definition would replace the FMLA's typical language, which requires that an employee work for an employer for 12 months and have worked at least 1,250 hours for the employer in the 12 months prior to taking leave. Further, this new FMLA leave applies to employers with fewer than 500 employees – replacing the previous cut off of 50 or more employees – but exempts employers with 500 or more employees.

However, these amendments are limited. Eligible employees are only permitted to take emergency FMLA leave to care for the minor son or daughter of the employee in the event that the child's school or place of care has been closed, or if the child care provider of the son or daughter is unavailable due to Coronavirus.

Importantly, whether an employee's covered leave is paid or not depends on the length of their leave:

- First 10 Days: An employee's first 10 days of eligible Coronavirus-related FMLA leave may be unpaid. However, an employee can choose to substitute accrued vacation leave, personal leave, or other medical or sick leave for unpaid leave (including the emergency sick leave described in reason 5 above). Employers cannot force an employee to use their accrued paid leave under existing vacation, sick, or PTO policies.
- After 10 Days: After the initial 10 days of unpaid leave have passed, employers must then provide paid Coronavirus-related FMLA leave (for the few reasons provided above) at no less than two-thirds the employee's regular rate of pay for the number of hours the employee would have been normally scheduled. Importantly, the monetary amount of paid FMLA leave an employee can receive is capped at \$200 per day and \$10,000 in the aggregate.

As is the case under traditional FMLA leave, an employee's Coronavirus-related leave is job-protected. Specifically, employees taking Coronavirus-related FMLA leave must be restored to their same or equivalent position when they return to work. However, there is an exception for employers with fewer than 25 employees if the employee's position does not exist after taking Coronavirus-related FMLA leave due to either: (a) an economic downturn; or (b) any other operating conditions that affect employment caused by a public health emergency during the period of leave. This exception is subject to certain conditions, however, including reasonable attempts by the employer to return the employee to an equivalent position, and efforts to contact the displaced employee for up to a year after they are displaced. Therefore, employers should use this exception very cautiously as the risk of litigation when not returning an employee to work is high and costly.

Importantly, the law exempts employers with fewer than 50 employees from civil FMLA damages in an FMLA lawsuit brought by employees, but it is important to note the Secretary of Labor retains the ability to bring an action to recover damages against employers with fewer than 50 employees for violations of this law.

Tax Implications

The new law does provide some financial relief to employers required to pay sick leave. For example, it provides a refundable tax credit equal to 100 percent of the qualified paid sick leave wages paid by an employer under the Emergency Paid Sick Leave Act for each calendar quarter. Employers are also provided a similar refundable tax credit equal to 100 percent of qualified family leave wages under the Emergency Family and Medical Leave Expansion Act. Both credits are allowed against the tax imposed by the employer portion of Social Security taxes.

The benefits provided under the new law, however, are not permitted to exceed the tax credit employers may receive under the law. For paid sick leave, this amount is limited to \$511 per day, or \$5,110 in total. Payment under the amended FMLA, meanwhile, is capped at \$200 per day, or \$10,000 in total.

For the latest information about coronavirus, we recommend that you consult with the CDC's website [cdc.gov/coronavirus/2019-ncov/index.html](https://www.cdc.gov/coronavirus/2019-ncov/index.html) and/or [osha.gov/SLTC/covid-19/](https://www.osha.gov/SLTC/covid-19/).

**If you have any questions about these ongoing issues
and how they may affect your business,
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