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UPDATE: The Families First Coronavirus Response Act

On March 18, 2020, Congress passed and the President signed into law the Families First Coronavirus Response Act. There are several provisions of the bill that will impact employers including a new Emergency Paid Sick Leave Act and a new Emergency Family and Medical Leave Act. These provisions apply to private employers and government entities with under 500 employees. There may be consideration for an exemption for employers with under 50 employees. There will also be notice requirements for both. Tax credits are available for employers that make payments under these provisions. The law is scheduled to go into effect 15 days after the signing of the Act (i.e. effective April 2nd) and will remain in effect through December 31, 2020. The Department of Labor is tasked with providing implementation guidelines in the interim.

To summarize the key provisions:

- The Emergency Paid Sick Leave Act requires 80 hours of paid sick leave for full time employees. Hours of sick leave for part time employees are based on the average number of hours worked in a two-week period prior to taking the leave. Emergency Paid Sick Leave is available for immediate use regardless of employment length. Employers must provide paid sick time "to the extent the employee is unable to work (or telework) due to a need for leave." Eligibility includes:
 - Employees experiencing symptoms of COVID-19 and seeking a medical diagnosis (Paid at 100% of the employee's regular rate, federal minimum wage or local minimum wage, whichever is higher, capped at \$511 per day or \$5,110 in total).
 - Employees subject to a government quarantine order or medically directed to self-quarantine related to COVID-19 (Paid at 100% of the employee's regular rate, federal minimum wage or local minimum wage, whichever is higher, capped at \$511 per day or \$5,110 in total).
 - Employees caring for another individual who must quarantine/self-quarantine for those reasons (Paid at 2/3 the employee's regular rate, capped at \$200 per day or \$2,000 in total).
 - Employees caring for a son or daughter whose school or childcare provider is unavailable due to COVID-19 (Paid at 2/3 the employee's regular rate, capped at \$200 per day or \$2,000 in total).

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- Employees experiencing “substantially similar conditions” as specified by the Secretary of Health and Human Services (Paid at 2/3 the employee’s regular rate, capped at \$200 per day or \$2,000 in total).

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from eligibility for emergency paid sick leave.

Special provision for variable hour employees

An employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick time, the employer shall use either (i) the average number of hours scheduled (including any type of leave) over the six month period ending when the employee takes paid sick leave, or (ii) if the employee did not work for the preceding six-month period prior to leave, the employee’s reasonable expectation of the average hours per day that the employee would be scheduled to work.

Possible Small Employer Exemption

The Emergency Paid Sick Leave Act gives authority to the Secretary of Labor to issue rules to exempt small businesses with fewer than 50 employees from the requirements of providing paid leave to care for a child who is out of school when the imposition of such requirements would jeopardize the viability of the business as a going concern. This exemption would not be available based on other reasons for paid sick leave.

Additional Information

- Emergency Paid Sick Leave sunsets on December 31, 2020.
- Emergency Paid Sick Leave does not carry over from year to year and is not required to be paid out upon termination of employment.
- An employee may use Emergency Paid Sick Leave before any other paid leave (PTO, vacation, employer’s paid sick days, state paid sick leave, etc.).
- An employer may not require an employee to use other paid leave (PTO, vacation, employer’s paid sick days, state paid sick leave, etc.) prior to using Emergency Paid Sick Leave.
- An employer may not require an employee using Emergency Paid Sick Leave to search for or find a replacement to cover the employee’s hours while the employee is using Emergency Paid Sick Leave.

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- Emergency Paid Sick Leave ends with the employee's next scheduled work shift immediately following the end of the covered need for Emergency Paid Sick Leave.
- An employer cannot retaliate against employees who take Emergency Paid Sick Leave or participate in a proceeding related to Emergency Paid Sick Leave.
- An employer may require the employee to follow reasonable notice procedures in order to continue receiving Emergency Paid Sick Leave after the first workday (or portion thereof) an employee receives paid sick leave.
- Employers must post a notice regarding the Emergency Paid Sick Leave. The Secretary of Labor is required to create a model notice no later than seven days after the signing of the new law, which will be March 25, 2020.

The **Emergency Family and Medical Leave Act (EFMLA)** provides a new reason for leave related to COVID-19. The EFMLA allows an employee who is unable to work (or telework) due to the need to care for a child under the age of 18 whose school or childcare is closed due to a public health emergency. The EFMLA provides up to 12 weeks of leave for this new leave reason to any employee who has worked for the employer for at least 30 days prior to the leave. There is no hours worked requirement similar to the federal FMLA. The 12 weeks of job protected leave provide paid leave after the first 10 days. Practically speaking, the first 10 days of EMFLA are generally covered by the Emergency Paid Sick Leave. An employee may use other available paid leave (PTO, vacation, employer's paid sick days, state paid sick leave, etc.) to cover the first 10 days. The EFMLA is paid at 2/3 of the employee's regular rate (capped at \$200 per day and \$10,000 in total).

An employer with fewer than 500 employees must provide the new EFMLA. An employer includes a corporation as a single employer rather than separate entities or divisions. The 75-mile radius applicable in FMLA does not apply to the new EFMLA.

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from eligibility for EFMLA.

Possible Small Employer Exemption

The EFMLA gives authority to the Secretary of Labor to issue rules to exempt small businesses with fewer than 50 employees from the requirements of providing paid leave to care for a child who is out of school when the imposition of such requirements would jeopardize the viability of the business as a going concern.

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Job Restoration

The EFMLA requires employees with 25 or more employees to provide traditional FMLA job restoration. Employers with fewer than 25 employees are not required to provide job restoration if the following conditions are met:

- The employee takes EFMLA.
- The position the employee held when the leave began does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave.
- The employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent employment benefits, pay, and other terms and conditions of employment.
- If the reasonable efforts to restore the employee to an equivalent position fail, the employer makes reasonable efforts to contact the employee during a one-year period beginning the earlier of (1) the date on which the need for EFMLA ends or (2) the date that is 12 weeks after the date on which the employee's EFMLA leave began.

Additional Information

- Emergency Family and Medical Leave sunsets on December 31, 2020.
- EFMLA does not expand the amount of FMLA leave an employee is entitled to in the employee's applicable 12-month period.
- An employer cannot retaliate against employees who take EFMLA. The existing anti-retaliation provisions of the FMLA apply to employees who take EFMLA.
- When the need for EFMLA is foreseeable, an employee must give the employer notice of such leave as is practicable.
- EFMLA does not contain a specific notice requirement, however, traditional FMLA notice requirements remain. The Department of Labor will likely update the traditional FMLA notice to include the new reason for EFMLA. Employers would be required to provide any notice updates related to traditional FMLA.

Tax Credits for Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Act

Employers subject to the requirements of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Act who paid employees under either law are entitled to tax credit. The tax credit will be equal to the amount of paid sick leave or paid EFMLA paid by the employer per quarter. Tax credits will be capped at the amount paid by the employer up to the caps of \$5,110,

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\$2,000, or \$10,000 as applicable for the reason for paid leave. The tax credits are applied against the employer's Social Security taxes. If an employer's costs for qualified leave payments exceed the amount of taxes owed, the employer will be reimbursed for the remaining amount. Federal, state, and local governments are not eligible for the federal tax credit.

An eligible employer cannot realize a double tax benefit (i.e., both a tax credit and a tax deduction for wages paid). A tax credit allowed under the Emergency Paid Sick Leave Act is not also allowed under the tax credit under the EFMLA. The tax credits must relate to wages paid on or before December 31, 2020, and do not carry over to the following year.