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Families First Coronavirus Response Act: Emergency Paid Sick Leave and Paid Family and Medical Leave Expansion Act Requirements

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Last week, Congress passed and President Trump signed into law the Families First Coronavirus Response Act (FFCRA), which contains several provisions that will significantly impact employers with fewer than 500 employees. These components of the FFCRA become effective on April 1, 2020, and will expire on December 31, 2020.

The U.S. Department of Labor (Department) has issued a model notice, which employers are required to post to inform their employees of their rights under the FFCRA.

Emergency Paid Sick Leave

The Emergency Paid Sick Leave Act, which is part of FFCRA, requires private sector employers with fewer than 500 employees to provide employees two weeks of paid sick leave, paid at:

the employees' regular rate up to a maximum of \$511 per day if the employee is unable to work because the employee is quarantined (pursuant to federal, state or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis, and

2/3 the employee's regular rate of pay up to a maximum of \$200 per day because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to federal, state or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the

Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

Under the Emergency Paid Sick Leave Act, full-time employees are entitled to two weeks (80 hours) and part-time employees are entitled to the typical number of hours that they work in a typical two-week period.

The Emergency Paid Sick Leave Act does not preempt existing “state or private paid leave,” but excludes any day in which the employee receives compensation from his/her employer or unemployment insurance benefits.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act, which is also part of the FFCRA, amends the federal Family and Medical Leave Act. Private sector employers with fewer than 500 employees are required to provide employees who have been on the job for at least 30 days with up to 12 weeks of job-protected leave for an employee who is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

The first 10 days of leave under the Emergency Family and Medical Leave Expansion Act **technically** are unpaid, but employees may use paid leave under the Emergency Paid Sick Leave Act or accrued vacation or paid time off (PTO) under their employer’s policy.

Under the Emergency Family and Medical Leave Expansion Act, companies that employ 25 or more employees generally are required to return employees to the same or substantially equivalent position. However, employers with fewer than 25 employees are not required to return the employee to work **if**

the position held by the employee when the leave started no longer exists due to economic conditions or other changes in operating conditions that affect employment, or were caused by a public health emergency, such as the COVID-19 pandemic, during the period of leave;

the company makes a reasonable effort to restore the employee to a position equivalent to the position he/she held when leave started, including with equivalent salary and benefits; and

if the above-noted reasonable efforts do not result in the employee being returned to his/her position, it nevertheless made reasonable efforts to contact the employee about equivalent positions.

Exclusions

Employers of Health Care Providers or Emergency Responders may elect to exclude such employees from eligibility for the leave provided under both the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act.

Small businesses — that is, those with fewer than 50 employees — may qualify for an exemption from the requirement to provide leave due to school closings or if child care is unavailable **if** the leave requirements would jeopardize the viability of the business as a going concern. The Department is expected to issue FFCRA regulations in April 2020.

Tax Credits

Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the FFCRA for a qualifying reason, up to the applicable per diem (and aggregate) payment caps.

Notice and Non-Enforcement

As noted above, the Department has prepared a model notice, which employers must post to inform employees of their rights under the FFCRA.

In addition, the Department has advised that it will provide a 30-day period for employers to come into compliance with the FFCRA. As a result, the Department will not bring an enforcement action against an employer for violations of the FFCRA, provided the employer has acted reasonably and in good faith to comply with the FFCRA. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the FFCRA in the future.

New York State Emergency Job Protection and Paid Leave

In addition to the federal protections, New York State enacted legislation to provide mandatory leave (“Quarantine Leave”) and certain paid benefits for employees affected by a quarantine order.

If an employee is subject to a mandatory or precautionary order of quarantine or isolation issued by the State of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order (an “Authorized Entity”) related to COVID-19 (an “Order”):

Private employers with 10 or fewer employees (and less than \$1 million in revenues in the preceding tax year) must provide unpaid Quarantine Leave until the Order is terminated, during which time, the employee is eligible for paid family leave (PFL) benefits and disability benefits;

Private employers with between 11 and 99 employees (or fewer than 10 employees if their net income in the preceding tax year was \$1 million or more) must provide five days of paid Quarantine Leave, and thereafter unpaid Quarantine Leave until the Order is terminated. During unpaid Quarantine Leave, employees are eligible for PFL and disability benefits;

Private employers with 100 or more employees must provide at least 14 days of paid Quarantine Leave; and

Public employers must provide at least 14 days of paid Quarantine Leave, without loss of accrued sick leave.

The legislation also amended certain sections of the PFL and disability laws to adjust for the provision of such benefits to individuals on Quarantine Leave.

The waiting period to receive disability benefits is waived so that employees eligible for Quarantine Leave may receive such payments on the first day of disability.

The definition of disability is expanded to include inability to perform an employee's regular duties or any other employment duties that may be offered by the employer as a result of an Order when the employee has exhausted all paid Quarantine Leave.

The PFL Act was amended to include as "family leave" any leave taken by an employee from work when an employee is subject to an Order or to provide care for a minor dependent child who is subject to an Order.

Unlike in most instances, an employee may receive disability benefits and PFL benefits concurrently on the first day of unpaid Quarantine Leave, subject to a weekly cap of \$2,043.92 for disability benefits and \$840.70 in PFL benefits.

Upon return to work following Quarantine Leave, an employee must be restored to the position he/she held prior to taking Quarantine Leave with the same terms and conditions of employment and is protected from any form of discrimination or retaliation by his/her employer or its agents for taking leave.

Limitations on Eligibility for Quarantine Leave or Benefits

There are limits on Quarantine Leave for individuals who are subject to an Order because they returned to the U.S. after personal travel to a country for which the CDC issued a level 2 or 3 travel health notice of which the individual had notice prior to such travel. Such individuals are entitled to use accrued leave, or if no leave is available, the employer must provide unpaid leave until the Order is terminated.

An employee is not entitled to Quarantine Leave or related benefits if he/she is asymptomatic or has not yet been diagnosed with any medical condition and is able to work while subject to an Order, whether through remote access or similar means.

If an employee is entitled to leave or benefits under federal law, he/she shall only be entitled to Quarantine Leave, PFL and disability benefits in an amount equal to the difference between such federal benefits and the benefits available under the New York State statute.

For More Information:

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