Families First Coronavirus Response Act: Paid Leave now Required for Absences Related to the Coronavirus (COVID-19)

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Practice Area: Labor and Employment

Early Saturday, March 14, 2020 the House of Representatives passed the Families First Coronavirus Response Act (the "Act"). The Senate is set to take this matter up on Monday, March 16, 2020 and President Trump stated that he will immediately sign the legislation. The Act has many facets to it including new temporary employer obligations relative to paid leaves of absence related to the Coronavirus (COVID-19) and expands employer obligations under the Federal Family and Medical Leave Law. Employers have time to prepare as the law will be effective 15 days after enactment (potentially as soon as March 31, 2020, if signed Monday). While there is much remaining to be analyzed under this new law, the following provides an initial overview so employers can begin preparations for compliance and education of the workforce.

Expansion of FMLA rights

First, the Act expands the pool of employees that qualify for federal FMLA leave. The Act will require employers with fewer than 500 employees[1] (and all government employers) to provide employees who have been employed for at least 30 days with FMLA leave for Coronavirus reasons if:

1. The employee is absent from work due to the employee's physical presence jeopardizing the health of others due to exposure to the Coronavirus or due to the employee exhibiting symptoms of the virus;
2. The employee will care for a family member who a health care provider or a public health authority determines has been exposed to the Coronavirus or who exhibits symptoms of the virus; or
3. The employee is needed to care for a son or daughter under 18 because a school or a place of care (daycare) has been closed or the child care provider is not available.

The definition of "family" in the application of the above requirements is expanded to include family members who are senior citizens, grandparents, grandchildren, next of kin of the employee or is a son or daughter with special needs. The definition of "spouse" also includes domestic partners, as defined under the law.

The rights and remedies available to an employee under the federal FMLA remain the same. Therefore, we recommend that employers review existing procedures and forms utilized to determine FMLA eligibility and update those materials to recognize the Act's broadened scope.[2]

Enhanced Right to Paid Time Off
The Act also mandates that employers provide "Emergency Paid Sick Leave." This benefit is available to employees to:

1. Self-isolate because of a Coronavirus diagnosis;
2. Obtain medical diagnosis or care if the employee is experiencing the symptoms of the Coronavirus;
3. Comply with an order of a public official or Health Care Provider that physical presence at work would jeopardize the health of others due to the employee's exposure to the Coronavirus or because the employee is exhibiting symptoms of the illness;
4. Care for a family member of the employee due to the family member's self-quarantining based upon exposure to the virus or because the family member is exhibiting symptoms and requires medical diagnosis or care; or
5. Care for a child of the employee if a school or place of care has been closed or the care provider for the child is unavailable.

If an employee meets one or more of these qualifications, the Act provides that the employee is entitled to Emergency Paid Sick Leave. Specifically, full-time employees will have 80 hours of sick leave available to them and part-time employees will have their average hours of work over a 2-week period available as Paid Sick Leave. If the employee has variable hours of work each week, the employee's average hours of work over the preceding 6 months will be used to determine the employee's average hours per week. The sick leave benefit will be paid at the employee's regular rate of pay for any absence due to the employee's own treatment or quarantine. The sick leave benefit will be paid at two-thirds of the employee's regular rate of pay for any absence to care for a family member or to provide child care due to school or daycare closure.

If an employee needs leave beyond the 2-weeks for Emergency Paid Sick Leave and continues to meet the requirements associated with the Act's mandate for paid leave under the FMLA, the employee will be paid not less than two-thirds of the employee's regular rate of pay (or minimum wage, if greater) for the regular hours of work missed, to the extent of the employee's already-existing available FMLA leave. The changes to the FMLA under the Act will expire on December 31, 2020.

Finally, for employee absences associated with non-FMLA qualifying reasons (e.g., an employer's decision to send an employee home because the employee is exhibiting flu-like symptoms), the employee may be eligible for Unemployment Insurance benefits beginning in the first week of absence. This provision will expire on December 31, 2020.

It is important to understand that the Act entitlement represents the "floor" of entitlement. In other words, employers will not enjoy a reduced obligation to provide Paid Sick Leave if it already offers Paid Sick Leave to employees. The Paid Sick Leave under the Act is in addition to what the employee may already be entitled to in employment. However, there will not be any carryover right for unused Sick Leave granted under the Act.

Again, it is important that employers revisit their protocol for determining eligibility for paid sick leave and prepare to implement the new mandate. Likewise, employers providing Paid Sick Leave and absence benefits should carefully log the wages paid related to compliance. As of now, the Act anticipates a tax credit available for sick leave wages paid to employees, subject to caps established under the law.

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[1] Exemptions for small employers (fewer than 50 employees) and certain emergency and healthcare workers continue to be discussed.
[2] The DOL will be issuing a Notice related to the new requirements that must be posted along with other employment related Notices to employees.

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