Families First Coronavirus Response Act: What Should Employers Do?

Mar 19 2020

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President Trump signed legislation on March 18, 2020 which modifies the requirements of the Family and Medical Leave Act (Emergency Family and Medical Leave Expansion Act, expands access to Unemployment Compensation Insurance Benefits (Emergency Unemployment Insurance Stabilization and Access Act of 2020) and creates paid sick leave (Emergency Paid Sick Leave Act) for employees while the employee or his/her family members are impacted by Covid-19. The legislative responses to the COVID-19 pandemic are all within the scope of what is known as the FAMILIES FIRST CORONAVIRUS RESPONSE ACT (the "Act").

The Act will take effect 15 days after enactment (April 2, 2020) with a sunset date of December 31, 2020. Therefore, it is critical that employers subject to the Act begin compliance preparations immediately.

The Act has several key components which impact employers subject to the law, including:

Emergency Family and Medical Leave Expansion Act (EFMLEA): The Act will require private sector employers with fewer than 500 employees (subject to the small business exemption discussed below) and governmental employers with 1 or more employees to provide an expansion of FMLA opportunities for employees who have been employed by the employer for at least 30 calendar days. The Act gives the Department of Labor explicit authority to exempt small businesses with fewer than 50 employees from the requirements when the imposition of such requirements would jeopardize the viability of the business, but we will have to wait for those regulations to be created.

The EFMLEA provides for time away from work, if the employee is unable to work or tele-work, because of COVID-19. The leave must be granted for employees caring for a close family member under quarantine or isolation, or caring for a minor child if the child's school or place of childcare has been closed or is unavailable due to a public health emergency. An employee may be eligible for regular FMLA leave if they have a COVID-19 diagnosis and they meet the normal requirements of the FMLA. An employee who is not ill but merely quarantined because of coming into contact with COVID-19 would not eligible for EFMLEA or regular FMLA.

The Act allows employers to exclude from the definition of "eligible employees" under the EFMLEA an employee who is a health care provider or an emergency first responder. In addition, for employers with fewer than 50 employees, the employer may be excused from compliance responsibility if the employer is able to demonstrate to the Department of Labor that compliance with the Act will "jeopardize the viability of the business as a going concern." The Department of Labor will issue regulations on the showing necessary for an employer to qualify for this exception.

Under the EFMLEA, a qualifying employee will not be eligible for pay from the employer for the first ten (10) work days of EFMLEA leave unless the employee has available accrued vacation, personal or sick leave which can be substituted for the otherwise unpaid time. An employer **is not permitted** to require the substitution of accrued paid leave which the employee may have for the 10 unpaid work day period. After the 10 work day period, the employee will be eligible for pay from the employer equal to 2/3 of the employee's regular rate of pay for the remainder of the available FMLA leave associated with the qualifying COVID-19 reason. For full time employees, the paid leave opportunity will be based on the regular rate of pay of the employee for the hours the employee would normally work. Part-time employees pay eligibility will be based on their regular hours worked per week – or if variable – the average hours worked in the preceding six months. Paid FMLA leave is allowed **only** for the reason of closure of the child's school or childcare and need to provide child care due to the public health emergency, and is limited to a total of $200 per day or $10,000 in the aggregate, per person.

It is important to note that while an employee is entitled to 12 weeks of leave under the EFMLEA, the length of the leave is reduced by any FMLA Leave previously taken by the employee – this is not a separate 12 week entitlement. In other words, the Emergency Leave for childcare purposes is automatically reduced by the amount of leave an employee has already taken in the current administrative year, without regard to the reason for the previous leave.

For full time employees, the paid leave opportunity will be based on the regular rate of pay of the employee for the hours the employee would normally work. Pay for part-time employees will be based on regular hours worked per week; if the part-time employee hours are variable, the employer will use average hours worked in the preceding six months. Employers will be eligible for a credit against their payroll tax obligations for all or part of the wages required to be paid under the EFMLEA, but the credit is limited to $200 per day and $10,000 in the aggregate, per person. If the wages paid exceed the payroll tax liability for the employer, the excess will be available as a refundable credit to the employer.

The FMLA's job protected leave requirements and anti-retaliation provisions also apply to EFMLEA scenarios, with one exception. The EMFLEA excludes employers with fewer than 25 employees from the immediate reinstatement obligation if the employee's position no longer exists following the leave due to operational changes which occurred as a result of the public health emergency. However, the reinstatement obligation will continue for the employer for up to 1 year if the employee is not returned to the former position at the end of his/her leave.

The Emergency Paid Sick Leave Act

The Families First Coronavirus Response Act also creates a limited term paid sick leave benefit for employees of private sector employers with fewer than 500 employees (again, subject to a small business exemption) and governmental employers with 1 or more employees. The Emergency Paid Sick Leave Act does not have a minimum term of employment for employee benefit eligibility. If employed by the employer, the employee will be eligible for paid sick leave.

To be entitled to employer paid sick leave, the employee must be unable to work or tele-work because (a) the employee is subject to a federal, State or local quarantine or isolation order relative to the COVID-19 virus; (b) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (c) the employee is experiencing symptoms of the COVID-19 and is seeking medical diagnosis from an appropriate health provider; (d) the employee is caring for a family member subject to a federal, state or local order related to COVID-19; (e) the employee is caring for a son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 precautions; or (f) the employee is experiencing a substantially similar condition to COVID-19 as has been identified by the Secretary of Health and Human Services. An employer may exclude from the eligible employee pool any employee who is a health care provider or is an emergency responder.

Similar to the EFMLEA, the Department of Labor may exclude employers with fewer than 50 employees from the requirements of the Paid Sick Leave Law where the employer can demonstrate that compliance with the law would "jeopardize the viability of the business as a going concern."

An employee may not carry over any unused Emergency Paid Sick Leave – it is "use it or lose it." Further, upon on an employee's separation from employment, any unused Emergency Paid Sick Leave is forfeited, *i.e.*, not paid out.

The amount of Emergency Paid Sick Leave available to employees is limited. Full-time employees will be eligible for 80 hours of Emergency Paid Sick Leave. This hour entitlement is pro-rated for part-time employees based upon their regular hours of work. For employees with a variable work schedule, the average bi-weekly hours of work over the preceding six month period will be utilized.

The actual pay to which an employee will be entitled will depend on the reason for the absence. If absent due to reasons identified under a), b) or c) above (generally arising from the employee's quarantine or in caring for the employee's family because of COVID-19 illness), the employee will be entitled to 100% of his/her regular hourly rate of pay (as long as in excess of minimum wage) for the hours of work missed (subject to the cap discussed below). For all other qualifying reasons for absence, the employee will be entitled to 2/3 of the employee's regular rate of pay or minimum wage, whichever is greater. The entitlements to Emergency Paid Sick Leave are limited to $511 per day, to a maximum aggregate payment of $5,110, where the leave is for the employees: (a) to quarantine; (b) having been advised to submit to quarantine; or (c) the employee is experiencing COVID-19 symptoms and is seeking medical diagnosis. For the remaining opportunities for Emergency Paid Sick Leave the employee will be paid at a maximum of $200 per day, $2,000 in the aggregate, for the qualifying period of absence.

Employees using Emergency Paid Sick Leave cannot be required to find their own replacement to be eligible for the benefit. Also, an employer may not require an employee to use other paid leave provided by the employer before using Emergency Paid Sick Leave – the ordering of use of benefits available to an employee during an eligible absence period is determined by the employee. Please note that the Paid Sick Leave Law does not diminish any right of employees under a collective bargaining agreement.

The Paid Sick Leave Law requires that the employee give notice to the employer of the desire to use the available paid time. Notice must be given to the employer no later than the first workday (or portion of such workday) that the employee receives Emergency Paid Sick Leave. The employer will be required to establish a reasonable notice process for qualifying employees.

An employer violating the Paid Sick Leave Law is subject to liability for unpaid benefits, reinstatement and other penalties including those available under the Fair Labor Standards Act of 1938. Employers are required to post notice to employees for their right to Paid Sick Leave, with the Department of Labor to publish a model notice within 7 days of enactment (March 25, 2020).

Tax Credits for Wages Paid
The Families First Coronavirus Response Act allows employers to receive a credit against their payroll taxes for payments made to employees for EFMLEA. Self-employed individuals are allowed similar credits against their self-employment tax liabilities. There are limits on the amounts available for the use as a credit. If the payroll tax liability is insufficient to cover the amounts paid by the employer, the excess is refundable.

Unemployment Compensation Rights
The Families First Coronavirus Response Act also affords an opportunity to affected employees absent due to the Coronavirus to access Unemployment Compensation Benefits at an earlier point than exists under current law. The Act not only increases funding for Unemployment Compensation Benefits, it also removes the "job search requirement" and allows for benefit entitlement on the first day of the loss of employment, rather than a one week waiting period for benefits. For Wisconsin employees, Governor Evers, through the Department of Workforce Development, has waived the job search requirement for Unemployment Compensation Insurance benefit eligibility. The Wisconsin Legislature still must take action to eliminate the one week benefit waiting period, which as of the writing of this Client Alert has not occurred.

Next Steps for Employers
Employers should evaluate their labor and employment obligations under the Families First Coronavirus Response Act. This includes::

1. Assess communications with employees to provide assurance, to the extent possible, about the safety of the workplace, the steps being taken in protecting the workplace from exposure, and how you are addressing exposures or close contacts that may create an exposure for transmission of the Coronavirus. Reiterate/train on the actions expected of employees for them to do their part in keeping the workplace safe – washing your hands, using disinfectant, staying home if sick, covering your cough, maintaining safe distances from others.
2. Evaluate Collective Bargaining Agreements for compliance obligations and limitations which may exist and evaluate issues which may be associated with scheduling and obligations to employees in the event of absence and/or layoff from work. Discussions with the Union as to the effects of the decision being made may help to lessen conflict. It is important to be careful not to sign any memorandum of understanding or other modification of the collective bargaining agreement without a full understanding of the changes sought or appreciating the long-term consequences of the agreed upon terms.
3. Review current policies and be careful of policy adjustments in an effort to provide supplemental benefits prior to the Act. The Act makes clear that the rights of employees under policies existing at the time enactment cannot be reversed or used as an offset against the entitlements now required by the law. This may result in the "doubling up" on benefits and entitlements not otherwise intended by the employer.
4. Develop a Coronavirus Policy and FAQs for your employees. During this time, employee uncertainty breeds unrest and unwarranted concerns as to what the future may bring. Employers should provide employees with guidance and the comfort necessary to understand that the employer has taken the steps necessary to protect the work environment from the contracting and/or the spreading of the COVID-19, that employees will be alerted should conditions change such that an absence from is work is required, that the employer will provide the employee with the full rights and benefits under federal, state and local law. It is important that the policy provide a definite sunset – it should not become a permanent feature of your policies.
5. Develop "work from home" rules and confirm with employees who will be asked, or who may elect with employer permission, what the expectations for such a work arrangement are. This includes expectations on productivity and the integrity of work, the performance requirements, security of electronic information and hardware and any other expectations under the temporary work scenario.
6. Update your Family and Medical Leave Policy to reflect the requirements of law. This may be by way of addendum since the EFMLEA is an interim, stop-gap measure expiring on December 31, 2020.
7. Provide employees with clear expectations and procedures as it relates to absences from work, eligibility for Paid Sick Leave and communications with/notices to Human Resources. It is critical that employees alert Human Resources as to vacations or trips to areas which are domestic "hot-spots" or level 2 or 3 zones, as identified by the CDC. This information will be important for communications with employees and to evaluate any special concerns raised or actions to be taken to protect the workplace from exposure.
8. Remain calm. Now is the time for company leadership and human resources to demonstrate the steady-hand of leadership in addressing the issues and concerns from employees. Emotions may be running high as people are uncertain as to the virus and its consequences to them and their loved ones. Appreciation for the uncertainty and concerns is essential as employers move forward.

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