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Families First Coronavirus Response Act Summary— Employer Provisions

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This article summarizes the Families First Coronavirus Response Act (H.R. 6201) (“the Act”), which was enacted March 18, 2020. The Act becomes effective 15 days after enactment, or Thursday, April 2, 2020. The Act in its current iteration will cease to be enforceable on December 31, 2020.

The Act provides two changes to employee leave: (1) 2 weeks of paid leave for specific COVID-19-related reasons and (2) changes to the Family and Medical Leave Act (“FMLA”) to expand an employee’s right to take leave, and an employer’s obligation to provide paid leave, to an employee for child care closures due to COVID-19. The Act also provides a tax credit to employers based on the paid leave that they were required to issue to their employees. This article will explain the Act’s key employment provisions, provide practical insight for employers applying the Act, and how the Act will likely affect other laws already in place.

Emergency Paid Sick Leave

First, the Act provides generally for 2 weeks of paid leave for an employee who is unable to work or telework because: (1) the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, (2) the employee has been advised by a healthcare provider to self-quarantine because of COVID-19, (3) the employee is experiencing symptoms of COVID-19 and seeking a diagnosis, (4) the employee is caring for an individual who is subject to the order or advice listed in items (1) or (2), (5) caring for a child because his/her school, day care, or child care provider (i.e. nanny or babysitter) is unavailable because of the COVID-19, or (6) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. Public employers and private employers with fewer than 500 employees are required to provide this paid leave. The Secretary of Labor can provide regulations to exclude certain health care providers and emergency responders from the definition of employer. Additionally, an employer of a health care provider or emergency responder employee can exclude such employees from coverage.

The 2 weeks of paid leave is calculated as the regular rate of pay for 80 hours for full-time employees, which is two 5-day workweeks, or for the average number of hours worked by a part-time employee over a 2-week period. The Secretary of Labor is required to issue guidelines to assist in calculating the amount of paid sick time 15 days after enactment, or April 2, 2020. This paid leave is available immediately to any employee regardless of how long the employee has been employed by the employer. The leave ends beginning with the next work shift after the employee no longer needs leave for the COVID-19-related reason, i.e. the self-isolation period ends or symptoms subside, if the need ends before the expiration of the 2 week period.

The final version of the Act imposes a cap on the maximum amount of wages paid to employees depending on the COVID-19-related category applicable to the employee. If the employee takes leave for his/her own COVID-19 illness or quarantine, then the employee can get a maximum of \$511 per day or \$5,110 in the aggregate for the entire two-week period. If the employee is caring for a family member because of COVID-19 exposure or a child because of school or day care closure, then the employee can receive up to \$200 per day or \$2,000 in the aggregate for the entire two-week period.

This paid leave is in addition to any leave policies the employer currently has in place on the day the Act is enacted (March 18), and the Act prevents employers from changing their leave policies to avoid providing additional leave to employees. An employer cannot require an employee to find a substitute during the 2 weeks of leave. An employer also cannot require the employee to use other paid leave provided by the employer instead of or before using the paid sick leave provided under the Act. The employer is required to notify employees of their right to sick leave, and the Secretary of Labor will release a model notice that meets this requirement within 7 days of enactment, or March 25, 2020.

The Act also includes an anti-retaliation provision which prevents the employer from discharging, disciplining, or in any way discriminating against an employee who takes leave under the Act or seeks to enforce the Act against his or her employer.

An employer who violates this Act by not providing the paid leave will be considered in violation of the minimum wage requirements of the Fair Labor Standards Act and subject to penalties and fines under the FLSA, which include owing the employees their unpaid minimum wages and an additional amount equal to the unpaid minimum wages as liquidated damages. Penalties could be even greater if there is a finding that the employer willfully violated the Act. If an employer violates the anti-retaliation provision of the Act, the employer would be liable for the anti-retaliation penalties under the FLSA, which may include reinstatement, lost wages, liquidated damages, and additional damages for a willful violation.

Emergency Family and Medical Leave Expansion Act

This provision of the Act expands FMLA leave to provide 2 weeks of unpaid leave, and 10 weeks of paid leave for the employee to stay home and care for a child because of school or child care facility closures due to COVID-19. Employers covered by this provision are the same as above, those with fewer than 500 employees and any public employer. Covered employees under this provision are different from the Emergency Paid Sick Leave Act because an employee must have been employed by the employer for 30 calendar days before seeking leave under this FMLA expansion. An employer of a health care provider or emergency responder employee can exclude the employee from the application of this leave.

An employee is eligible for the expanded leave if the employee is unable to work or telework in order to care for his/her child under 18 years of age if the school or place of care has been closed, or the child care provider (i.e. nanny or babysitter) is unavailable due to COVID-19.

The first 10 days of leave under the FMLA expansion may be unpaid leave. The employee can substitute any accrued paid leave for these initial 10 days, but an employer cannot require an employee to use any additional leave provided by the employer instead of or before the leave provided under the Act. The employee must give as much notice as practicable prior to taking leave.

After the first 10 days of unpaid leave expire, the Act requires the employer to provide up to 10 weeks of additional paid leave. The paid leave is normally calculated as at least two-thirds of an employee's regular rate of pay multiplied by the number of hours the employee normally would be scheduled to work. The final version of the Act places a limit of \$200 per day or \$10,000 in the aggregate for the 10 weeks of paid leave.

If the employee works a varying schedule, then the employer would calculate the employee's paid leave as the average number of hours the employee was scheduled per day over the six month period before the employee took leave. If the employee did not work over that six month period, then the calculation is based on the reasonable expectation of the employee of the number of hours per day that the employee would normally be scheduled to work.

The employer generally has an obligation to restore the employee to the position the employee held prior to taking the leave. Under the expanded leave, employers who have fewer than 25 employees are not required to restore the employee to the prior position if certain conditions are met. If the employee takes leave and the employee's position does not exist at the end of that leave because of economic or other employment-affecting conditions that arose because of the COVID-19 crisis, then the employer must make reasonable efforts to restore the employee to an equivalent position to that which the employee had prior to taking leave. If the employer fails to find an equivalent position, then the employer must contact the employee for a one year period if an equivalent position becomes available. This one-year period begins on the earlier of the date the qualifying need ends (i.e. schools or child care re-opens), or 12 weeks after the leave commences.

Employer Protections: Exceptions and Tax Credits

In response to these additional leave benefits provided to employees, the Act provides two main routes to protect employers, especially small businesses, who cannot afford to provide paid leave because their businesses are severely diminished by COVID-19.

The Act provides that the Secretary of Labor can exempt employers with fewer than 50 employees from both leave provisions of the Act if the employer can show that the leave would jeopardize the viability of the business.

The Act also provides tax credits to employers who have to provide paid leave under the above provisions. The employer will get a tax credit equal to 100 percent of the qualified sick leave or qualified family leave wages paid by such employer in each calendar quarter. The credit can only be as high as the employer's payroll taxes for that quarter; however, any qualifying amounts paid to employees as leave in excess of the payroll taxes owed will be treated as an overpayment that shall be refunded to the employer. Specifically, for calculating the credit for the paid sick leave, the amount of qualified sick leave wages is capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days

per employee in each calendar quarter. This means that if the employee takes seven days of sick leave in the first quarter (January, February, and March) and three days of sick leave in the second quarter (April, May, and June), then the employer can receive a tax credit for the seven days from the first quarter and three days from the second, and then cannot receive any more tax credits for that employee based on paid sick leave under the Act. The tax credit provisions also include protections to avoid duplication of benefits.

For calculating the credit for the 10 weeks of paid leave under the Family and Medical Leave expansion, the amount of qualified family leave wages paid to any employee which may be taken into account for a quarter is capped at \$200 per day and \$10,000 in the aggregate for all calendar quarters.

Unfortunately for smaller employers, the tax credit would not resolve the immediate cash flow issues created by providing paid leave to their employees because the credit would only be issued on a quarterly basis. The only route currently provided in the Act to protect these employers is to seek relief from the Secretary of Labor by seeking an exemption if they have less than 50 employees. Additionally, the Small Business Administration and other government agencies have been providing low or zero interest rate loans that can help some employers, depending on their circumstances.

Practical Concerns for Employers

The COVID-19 crisis has affected many Americans, both in regard to health and economics, and this Act is Congress' attempt to provide relief to those it views as the most economically vulnerable—employees who are directly affected by COVID-19 and cannot go to work. Despite this crucial concern, the Act does create issues for certain employers who fall through the economic cracks, such that some employers cannot seek exemption under the Act, but also cannot afford to cover the paid leave mandated.

Additionally, this Act raises numerous other legal issues. The Act itself directly implicates Federal wage and hour laws under the Fair Labor Standards Act, as well as State and Federal anti-discrimination laws. Further, the Act requires consideration of the employer's obligation under HIPAA regarding its employees' health information.

This international emergency also raises questions regarding the continued enforceability of contracts that contain "force majeure" clauses covering such emergencies, torts and casualty claims raised based on COVID-19, and workers' compensation or OSHA claims brought by employees who allege they contract COVID-19 during their employment. There are also potential concerns under the National Labor Relations Act, the WARN Act, and other miscellaneous laws as well.

Employers must educate their workforce regarding the severity of COVID-19 generally and review their personnel policies and contracts to determine the leave policies provided and how to incorporate the new leaves provided in the Act. Most importantly, during this time when laws are being changed every day, employers need to discuss potential challenges and decisions with legal counsel to determine how the new laws being considered by Federal, State, and local governments might impact their business.

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