



March 19, 2020

Families First Coronavirus Response Act: Guidance for Employers

On March 18, 2020, Congress passed the Families First Coronavirus Response Act (the “Act”). President Trump signed the Act later that same day. Several provisions of the Act significantly impact employers.

Specifically, the Act expands the Family and Medical Leave Act (“FMLA”) such that employers who were not previously subject to the FMLA, and employees who were not previously eligible, are now eligible in certain circumstances as it pertains to COVID-19. The Act also requires employers with less than 500 employees to provide up to two weeks paid leave for absences related to COVID-19 illness or preventative quarantine measures, as discussed in further detail below. To offset the effect on employers, the Act provides for tax credits in certain circumstances. Finally, the Act expands unemployment compensation benefits.

Emergency Family and Medical Leave Expansion Act

The Act amends the FMLA through the Emergency Family and Medical Leave Expansion Act (“FMLEA”) to provide that any employer who employs fewer than 500 employees, as well as government employers, are required to provide up to 12 weeks of job-protected leave because of a “qualifying need” to any individual who has been employed for at least 30 calendar days. This modifies the typical requirement that an employee work for a full year before they are eligible for FMLA leave.

A “qualifying need” exists when an employee is unable to work or telework due to the need to care for a son or daughter under the age of 18 whose school or daycare has closed or whose caregiver is otherwise unavailable because of a public health emergency related to COVID-19.

The first 10 days of leave may be unpaid, but the employee may be eligible for Emergency Paid Sick Leave (see below) or may elect, but may not be required, to substitute accrued paid leave. After 10 days, the employer must pay the employee an amount that is not less than two-thirds (2/3) of the employee’s regular rate of pay and normal number of hours not to exceed \$200 per day and \$10,000 in the aggregate. The employer may not require the employee to exhaust or use available paid leave.

The restoration provisions of the FMLA, which require employers to restore employees taking FMLA leave to the same or similar position, also apply, except to employers with fewer than 25 employees if the position held when the paid emergency leave started no longer exists due to economic conditions or other operating changes caused by the public health emergency during the leave period. Further, to be exempt from the restoration requirements, an employer with fewer than 25 employees must have made reasonable efforts to restore the employee to the same position with equivalent pay/benefits.

Employers may elect to exempt health care provider or emergency responder employees from the FMLEA. The FMLEA, however, also states the Secretary of Labor may issue regulations clarifying this exemption.

Employers subject to the Act may not be sued by employees for not complying with the leave mandates unless the employer has more than 50 employees. Thus, employees who work for smaller business will not have a private right of action against their employer.

Employers signed to multiemployer CBAs may fulfill their obligations under the FMLEA by contributing to a multiemployer plan/fund/program if the plan/fund/program allows employees to secure payment based upon hours they worked under the CBA for paid leave taken under the amended provisions.

Finally, the Secretary of Labor may issue regulations providing exemptions for small business with less than 50 employees where complying with the requirements would jeopardize the viability of the business.

Emergency Paid Sick Leave

The Act also includes the Emergency Paid Sick Leave Act (“EPSLA”), which requires employers with less than 500 employees or government employers to provide 80 hours of paid sick leave to full-time employees and a prorated amount of paid sick leave for part-time employees. Part-time employees are eligible for paid sick leave equal to the average number of hours that the employee works over a two-week period.

Paid sick leave must be provided for the following reasons:

1. The employee is subject to quarantine due to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to a quarantine order due to COVID-19 or caring for an individual who was advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. The employee is caring for a son or daughter whose school or daycare has closed because of COVID-19, or whose child care provider is unavailable due to COVID-19; or
6. The employee is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services, the Secretary of the Treasury, and the Secretary of Labor.

The EPSLA requires paid sick leave, but it provides certain caps. If an employee takes leave for reasons 1 through 3, the employee receives paid sick leave at the greater of his or her regular rate of pay or applicable minimum wage; however, the rate of pay is limited to a maximum rate of \$511 per day or \$5,110 in the aggregate. Leave for reasons 4 through 6 above, is paid at the greater of 2/3 the employee’s regular rate or pay or applicable minimum wage; however, the rate of pay is limited to \$200 per day or \$2,000 in the aggregate.

Employees are immediately eligible for the leave no matter how long the employee has been employed. Leave under the EPSLA does not carry over from year to year. Employers may not require employees to use other paid leave before using the leave provided by the EPSLA.

The EPSLA provides that it will not be construed to diminish rights an employee has under other applicable laws or employer policies. Thus, leave under the EPSLA must be provided in addition to any leave an employer is required to provide under applicable state or local laws, or any leave an employer already provides under its existing policies.

Employers are required to post notice of the EPSLA. The Secretary of Labor is required to provide a model notice within 7 days of enactment, which may be used by employers.

The EPSLA includes an anti-retaliation provision and a mechanism for bringing claims for violations. Failure to comply with the EPSLA will be treated as a failure to pay minimum wages under the Fair Labor Standards Act (“FLSA”), and subjects employers to the same penalties provided under the FLSA.

Like the FMLEA, the EPSLA allows employers of health care providers or emergency responders to elect to exempt such employees from the sick pay provisions of the EPSLA. However, the EPSLA also provides the Secretary of Labor may issue regulations clarifying this exemption.

Additionally, the EPSLA orders the Secretary of Labor to issue guidelines to assist employers in calculating the amount of paid sick leave by April 2, 2020. Further, the EPSLA provides the Secretary of Labor may issue regulations providing exemptions for small business with less than 50 employees where complying with the requirements would jeopardize the viability of the business.

Effective Date and Duration

Both the FMLEA and the EPSLA are effective no later than 15 days from after the date of enactment, or April 2, 2020. Thus, on April 2nd, employers must begin providing benefits under the FMLEA and the EPSLA. Both the FMLEA and the EPSLA expire on December 31, 2020.

Tax Credits

To provide some relief to employers, the Act provides costs incurred in providing the benefits required under the FMLEA and the EPSLA may be reimbursed through refundable tax credits against the 6.2% Social Security payroll tax imposed on employers. The amount of the tax credit for benefits provided under the EPSLA will not exceed the \$200 or \$511 per-day maximum payment. Similarly, the amount of the tax credit for benefits provided under the FMLEA will not exceed the \$200 per-day maximum. Only employers required to provide benefits under the FMLEA and the EPSLA may be eligible to receive the refundable tax credits.

Unemployment Insurance

The Act also permits the Secretary of Labor to provide emergency funds to states meeting certain requirements to provide additional funds relating to unemployment benefits and processing.

Conclusion

We are continuing to monitor this and will provide updates as this situation develops, and when further guidance is available. The attorneys at [Kutak Rock](#) are available to answer any questions you may have in this unprecedented time.

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