

On March 18, 2020, Congress passed an amended version of the Families First Coronavirus Response Act (“FFCRA”). President Trump signed the bill later that same evening and the new law will become effective on April 2, 2020. The bill is an economic stimulus plan addressing the impact of COVID-19 by introducing paid sick leave and expanding the Family and Medical Leave Act. The major components of this law affecting employers are summarized below.

I. Emergency Family and Medical Leave Act

Coverage: The new Act significantly expands FMLA leave on a temporary basis. The current minimum employee threshold for FMLA coverage would expand from only covering employers with 50 or more employees to employers with fewer than 500 employees. Now, rather than requiring twelve months of employment to be eligible for FMLA leave, any employee who has worked for the employer for at least 30 days prior to the designated leave may be eligible to receive paid family and medical leave. However, the Act includes language allowing the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business.

The Act is silent as to calculating the employee thresholds of 500 or 50 employees. Employers should likely consult the requirements under the traditional FMLA for determining whether they fall under this threshold. Traditionally under the FMLA, a private-sector employer is covered by the FMLA if it employs 50 or more employees in 20 or more workweeks in the current or previous calendar year. An employee is considered to be employed each working day of the calendar week if the employee works any part of the week. The workweeks do not have to be consecutive.

Reason for Leave: There is only one “qualifying need” for Emergency FMLA. According to the new Act, any individual employed by the employer for at least 30 days (before the first day of leave) may take up to 12 weeks of job-protected leave to allow an employee, who is unable to work or telework, to care for the employee’s child (under 18 years of age) if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

Pay Requirements: Additionally, the first 10 days of Emergency FMLA may be unpaid. During this 10 day period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the 10 day unpaid period. After the 10 day period, the employer generally must pay full-time employees two-thirds the employee’s regular rate for the number of hours the employee would be scheduled under normal circumstances. The new Act limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.

Part-time Employee Pay: Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for six months prior to taking Emergency FMLA. Employees who have worked for less than six months are entitled to the employee’s reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

Job Restoration: Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee to the same or equivalent position upon the return to work. Employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

Deadline: This program is set to remain in effect until December 31, 2020.

II. Emergency Paid Sick Leave

Reasons for Paid Sick Leave: A private employer with fewer than 500 employees must provide paid sick time to an employee who is unable to work or telework because the:

(1) employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;

(2) employee has been advised by a health care provider to self-quarantine because of COVID-19;

(3) employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;

(4) employee is caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;

(5) 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

(6) employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Unlike the Emergency FMLA requirements, an employee is immediately eligible for this leave—i.e. no requirement exists requiring the employee to have been on the payroll for at least 30 days.

Eligibility: As with Emergency FMLA, an employer may exclude employees who are health care providers or emergency responders from this coverage. The bill also grants the Secretary of Labor the authority to issue regulations to: (a) exclude certain health care providers and emergency responders from the definition of employee by, among other things, allowing them to opt out; (b) exempt small businesses with fewer than 50 employees from these requirements if they jeopardize the viability of a business as a going concern; and (c) ensure consistency between the paid family and paid sick standards and tax credits.

In general, an employee is entitled to 80 hours of paid sick time (or, for workers who work less than full time, the typical number of hours they are scheduled to work in a two-week period).

Cap: The bill limits an employer's requirement of paid leave to \$511 per day (\$5,110 in the aggregate) where leave is taken for reasons (1), (2), and (3) noted above (generally, an employee's own illness or quarantine); and \$200 per day (\$2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (care for others or school closures).

Retaliation: The bill prohibits retaliation against any employee who takes leave in accordance with the new Act. The bill also provides that not paying the required sick leave will be treated as a failure to pay minimum wages in violation of the Fair Labor Standards Act.

Deadline: These provisions are also set to expire on December 31, 2020.

III. Tax Credits For Paid Sick And Paid Family And Medical Leave

The bill also includes a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid FMLA leave described above. These tax credits are allowed against the employer portion of Social Security taxes. While this limits application of the tax credit, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

Employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act. Additionally, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with Emergency FMLA. Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

Summary

The FFCRA's paid-leave obligations are in addition to existing federal employee leave laws. This means employers are still bound by traditional FMLA and ADA analyses for employees with qualifying health conditions. For instance, although an employee diagnosed with Coronavirus may not qualify for paid leave under the FFCRA's expanded FMLA paid leave, that same employee may have a "serious health condition" under traditional FMLA analysis, which would entitle the employee to unpaid, job-protected leave. In sum, employers must view these new FFCRA obligations in conjunction with existing federal, state, and local leave laws when examining their employees' rights to protected leave.

Obligations for employers seem to be changing by the day as this crisis progresses. Carr Allison will continue to monitor these developments and walk with our clients through each of these challenges. Please do not hesitate to contact one of us on CARR ALLISON's COVID-19 RESPONSE TEAM if you have any questions regarding COVID-19 and your obligations as an employer.

CONTACT OUR COVID-19 RESPONSE TEAM at www.carrallison.com

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