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CORONAVIRUS BREAKING NEWS: EVERYTHING YOU NEED TO KNOW ABOUT THE NEW & IMPROVED FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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By Jennifer Platzkere Snyder

On Wednesday, March 18, 2020, the U.S. Senate ratified an [amended version of HR 6201](#), the [Families First Coronavirus Response Act](#) (“FFCRA”), which President Trump signed into law that day. Besides dealing with immediate public health related matters, employees who work for private sector employers with fewer than 500 employees or governmental employers will be eligible for two different forms of paid leaves as a result of the impacts of COVID-19. While compensation for these leaves are paid up front by the employer, the Federal government is providing offsetting tax credits so that there should be no net cost to the employer.

The employment leaves available under the FFCRA will become available on or before April 2, 2020 – depending on when the Secretary of Labor issues mandatory interpretive guidance and regulations – and expire on December 31, 2020. Details of these leaves, and the associated tax credits authorize to cover the costs associated therewith, are summarized below.

Emergency Family and Medical Leave Expansion Act

The FFCRA amends the Family and Medical Leave Act (FMLA) to provide for up to 12 weeks of job-protected leave for employees who are unable to work or telework due to having to care for a child under the age of 18 because of a school closure, lack of day care, or absence of other child care arrangements (such as a nanny) caused by the COVID-19 public health emergency.

Employees are eligible for this “emergency FMLA” so long as they worked for a covered employer for at least 30 days prior to the need for leave. There is no 12 month minimum working period, nor minimum threshold of hours worked, as would be required for other types of FMLA-eligible leave.

The first 10 days of emergency FMLA leave are unpaid, unless the employee chooses to substitute or simultaneously use available accrued paid personal, vacation or sick leave time. After that, emergency FMLA leave will be paid at a rate not less than two-thirds the employee’s regular rate of pay for the remaining duration of the leave, **with a cap of \$200 per day and \$10,000 in the aggregate**. The cost to employers of providing the paid emergency FMLA leave will be offset by tax incentives, described below.

Importantly, employers with fewer than 25 employees may not be required to provide job restoration if the employee’s position no longer exists when the emergency FMLA leave ends due to economic conditions or other operational issues that affect employment or coronavirus.

The Secretary of Labor is required to issue a Notice summarizing employer obligations and employee rights under this new type of FMLA leave. The Notice will be required to be posted in a conspicuous manner like other mandatory legal notices describing employee rights. To the extent an employer circulates such notices electronically or posts them on the employer's Intranet, the employer should do the same for this leave.

In addition, the Secretary of Labor will be authorized to permit employers of fewer than 50 employees to apply for an exemption from providing this emergency FMLA leave, as well as exclude employees of certain health care providers and emergency responders from eligibility for this leave. We will provide an update on the Notice and regulations once they are published.

Emergency Paid Sick Leave Act

Employers with fewer than 500 employees now also have to provide full-time employees with 10 days/80 hours of paid sick leave for specific circumstances occurring during the COVID-19 pandemic, with part-time employees being entitled to paid leave for the number of hours that they work in a typical two-week period. Employees who are unable to work or telework will be eligible for this paid leave if they:

- Are subject to quarantine or isolation by government order,
- Must self-quarantine because of a coronavirus diagnosis,
- Are seeking a medical diagnosis because they are experiencing coronavirus symptoms,
- Are caring for an individual who falls into categories 1 or 2 above,
- Must care for a child under the age of 18 who is out of school or otherwise have had care arrangements disrupted due to the COVID-19 public health emergency, or
- Are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

For employees eligible for this leave based on categories 1-3 set forth above, they must be paid their **regular rate of pay up to \$511 per day (up to a total of \$5,110 for the 10 days)**. For employees eligible for this leave based on categories 4-6 set forth above, they must be paid not less than **two-thirds of their regular rate of pay up to \$200 per day (up to a total of \$2,000 for the 10 days)**.

Unlike the emergency FMLA provisions, it does not appear that exemptions will be available for employees of health care providers or emergency responders, or employers with 25 or fewer employees. There is also not a minimum number of days that an employee needs to have worked

for a covered employer before becoming eligible for this leave. The only threshold issue besides fitting into one of the six qualifying categories is that the employer employ fewer than 500 employees.

It bears noting that the emergency paid leave act appears to offer a new form of paid leave in addition to any other paid personal, sick or vacation benefits that employees may have earned through employment, whether pursuant to employer policies or state or local law. It does not appear that the tax credits available for providing leave pursuant to the emergency paid leave act can be offset against other employer-funded paid time off.

Please be aware that Congress and the White House are currently working another emergency stimulus plan to counteract the economic effects of the COVID-19 pandemic, which plan is projected to include support for employees of employers with 500 or more employees.

Unemployment Insurance

In addition the paid leaves described above, the FFCRA also provides \$1 billion in emergency unemployment insurance (UI) relief to the states: \$500 million for costs associated with increased administration of each state's UI program and \$500 million held in reserve to assist states with a ten percent (10%) increase in unemployment, provided such states temporarily relax certain UI eligibility requirements, such as waiting periods and requirements for work search efforts. Pennsylvania Governor Tom Wolf already relaxed such requirements, and New Jersey Governor Phil Murphy is expected to follow suit.

Tax Credits to Pay for New Leaves

Covered employers will be eligible for a series of refundable tax credits to offset the costs of providing the required paid emergency sick leave and/or paid emergency FMLA described above. Self-employed individuals – such as Uber drivers and others who work in the gig economy – are also eligible for tax credits to the extent they need to take a leave of absence from performing work due to one of the covered reasons for leave. Treasury Secretary Steve Mnuchin has stated that the Treasury Department will use its regulatory authority to advance funds to small employers enabling them to comply with the FFCRA.

During each calendar quarter, employers will receive a refundable tax credit in an amount equal to 100% of qualified paid sick leave wages and qualified emergency family leave wages paid by the employer. The tax credits are allowed against the employer's 6.2% share of Social Security taxes. The amount of qualified family leave wages taken into account is capped at \$200 per day and \$10,000 for all calendar quarters for each employee. If the credit exceeds the employer's total liability for its share of Social Security taxes for all employees for any calendar quarter, the excess credit is then refundable to the employer.



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Meanwhile, self-employed individuals will be eligible for a refundable tax credit in an amount equal to 100% of a “qualified sick leave equivalent amount” if they must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to coronavirus. Eligible self-employed individuals are individuals who would be entitled to receive paid emergency FMLA leave if the individual were the common law employee of a covered employer. Self-employed individuals needing a leave from work to care for a family member due to coronavirus issues described above, or for a child whose school or place of care has been closed or other care interrupted due to coronavirus, will be able to receive a refundable tax credit in an amount equal to 67% of the qualified sick leave equivalent. Likewise, a refundable tax credit equal to 100% of a qualified family leave equivalent amount (capped at the lesser \$200 per day or the average daily self-employment income for the taxable year per day) is also available for eligible self-employed individuals. The credit is allowed against income taxes and is refundable.

Next Steps

These leaves are very nuanced and specifically tailored to provide immediate support to employees of small and medium sized businesses affected by the coronavirus pandemic. We anticipate the forthcoming Notice from the Secretary of Labor, along with the interpretive regulations, will be helpful in answering specific questions about these leaves and we will report on those once published. We will also publicize details of the third-wave stimulus plan currently being debated in Congress, once details are finalized and passed.

If you have questions about this alert or other coronavirus preparedness steps your business should take, please contact [Jennifer Platzkere Snyder](#) or any other member of our [Labor & Employment Group](#) or [Tax Group](#).