Families First Coronavirus Response Bill

The federal government has enacted the COVID-19 Coronavirus Response Act, requiring employers with fewer than 500 employees to provide paid sick leave and expanded FMLA protections, effective April 2.

In our continued efforts to keep our clients informed of law and policy changes resulting from COVID-19 and how they may impact your business, Preti Flaherty Employment Law attorney Elizabeth Olivier compiled this update on new employment legislation signed by President Trump.

The Act provides two separate paid leave employment benefits for employees who miss work for reasons related to COVID-19: The Emergency Family and Medical Leave Expansion Act, which expands FMLA guidelines to allow leave for certain reasons related to the COVID-19 emergency; and the Emergency Paid Sick Leave Act, which provides paid sick leave for employees impacted by COVID-19 and those serving as caregivers for individuals with COVID-19. Each becomes effective no later than April 2, 2020 (15 days after the March 18, 2020 enactment date) and expires December 31, 2020. Details and criteria for each of these benefit expansions are below:

Emergency Family and Medical Leave Expansion Act

Public Health Emergency Leave

· This section of the law expands FMLA for a qualifying need related to a public health emergency.
Applies to employees who are unable to work (or telework) "due to a need for leave to care for a son or daughter under 18 years of age...if the school or place of care has been closed, or the childcare provider of such son or daughter is unavailable, due to a public health emergency."

Public health emergency means an emergency related to COVID-19 declared by a federal, state or local authority.

- The first 10 days of leave taken by the employee are unpaid. However, the employee may elect to substitute available paid vacation leave, personal leave or medical or sick leave.
- The employer must provide paid leave for the remaining 10 weeks for FMLA leave
  - The paid leave must be an amount that is not less than two-thirds of an employee's regular rate of pay and the number of hours the employee would normally be scheduled to work. However, pay need not exceed $200 per day and $10,000 in the aggregate.
- For employees with varying schedules, the employer can look to the average hours over a 6-month period.

**Employers Covered**
- Applies only to employers with fewer than 500 employees
- The Department of Labor has authority to create regulations that can exempt small business with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business.

**Employee Eligibility**
- Any employee who has been employed for at least 30 days as of the date leave is requested is eligible for leave.
- Employers of health care providers or emergency responders may elect to exclude such employees from application of the FMLA leave for a public health emergency. The Department of Labor may also exclude them from the definition of employee under the Act.

**Job Restoration**
- Employers with 25 or more employees will have the same job restoration obligations as exist under the traditional FMLA
- Job restoration is not required for employers with fewer than 25 employees if:
  - The position held by employee when leave commenced is eliminated because of economic conditions or other changes in operating conditions of employer caused by the public health emergency during period of leave; and
  - The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held at commencement of leave with equivalent benefits, pay, and other terms and conditions of employment; and
  - If such efforts fail, the employer makes reasonable efforts to contact the employee for a one-year period beginning on earlier of the date on which the public emergency need concludes, or a date 12 weeks after the date leave commences.
Emergency Paid Sick Leave Act

Paid Sick Time Requirement

- Full time employees are entitled to 80 hours of paid sick leave (10 work days);
- Part-time employees are entitled to a number of hours equal to the number of hours that such employee works, on average, over a 2-week period
- Compensation for paid sick time will be calculated at the employee’s regular pay rate up to a maximum of $511 per day and $5,110 in the aggregate for employees using paid sick leave for the following:
  - The employee is subject to a quarantine or isolation order related to COVID-19
  - The employee has been advised by a health care provider to self-quarantine due to COVID-19
  - The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
- Compensation for paid sick time will be calculated at two thirds of the employee's regular pay rate up to a maximum of $200 per day and $2,000 in the aggregate for employees using paid sick leave for the following:
  - The employee is caring for an individual who is subject to a quarantine order or has been advised to self-quarantine
  - The employee is caring for their son or daughter if the school or childcare of that son or daughter has been closed, or the childcare provider of such son or daughter is unavailable due to COVID-19 precautions
  - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and Secretary of Labor
- The paid sick leave under this law is leave in addition to other paid leave an employer provides. *Employers cannot require employees to use other paid leave first.*

Covered Employer

- A private entity or individual employing fewer than 500 employees
- A public agency or any other entity that is not a private entity that employs 1 or more employees.
- The Department of Labor may create regulations to:
  - Exempt small business with fewer than 50 employees from certain provisions when the imposition of such requirements would jeopardize the viability of the business as a going concern; and
  - Exclude certain health care providers and emergency responders, including by allowing the employer of such employees to opt out.

Employee Eligibility

- The act applies to any individual who is an employee under the FLSA regardless of how long that individual was employed with the employer.
· An employer of an employee who is a health care provider or emergency responder may elect to exclude such employee.

**No Termination Pay-Out or Carry Over Required**
· Paid sick time not used at the time of termination, resignation or retirement does not need to be paid out to the employee.
· Unused time does not carry over to the following year.

**Posting and Enforcement**
· Employers must post a notice to be prepared by the Department of Labor
· Violation of the paid sick leave requirements is viewed as a violation of the minimum wage requirements of the FLSA.

**Tax Credits for Paid Sick and Paid FMLA**

The Act provides for refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above. These tax credits are allowed against the employer portion of Social Security taxes. Application of the tax credit is limited, but if the aggregate amount of qualified sick and family leave wages paid by the employer with respect to a calendar quarter exceeds the employer's portion of the quarterly Social Security tax payments payable with respect to all employees, the excess is treated as an overpayment and will result in a refund for the employer.

**Individual State Updates**

Many states are proposing emergency legislation to enact or expand their own paid sick leave or family and medical leave laws to cover COVID-19-related issues. Some of these state laws may be in addition to these new requirements at the federal level.