Employment Issues under the Families First Coronavirus Act of 2020

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On March 18, 2020, President Trump signed into law the Families First Coronavirus Recovery Act that aims to provide emergency supplemental relief to Americans affected by the novel coronavirus (COVID-19) outbreak. The Act, among other things, aims to provide such relief by addressing three employment-related areas: (1) emergency paid sick leave to employees, (2) emergency leave under the Family and Medical Leave Act, and (3) support for unemployment insurance. The Department of Labor has now issued guidance, including a Fact Sheet for Employees, a Fact Sheet for Employers and a Questions and Answers document.

Emergency Paid Sick Leave

The Act creates emergency paid sick leave for employees affected by COVID-19. The emergency paid sick leave provisions of the Act will apply to employers with fewer than 500 employees. But, the Act allows the Department of Labor to exempt employers with fewer than 50 employees from the emergency paid sick leave requirement where it would "jeopardize the viability of the business."

An employee is entitled to emergency paid sick leave if he or she cannot work or telecommute because:

1. The employee is subject to a federal, state, or local quarantine order related to COVID-19;
2. The employee has been advised by a healthcare provider to self-quarantine due to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual subject to a quarantine order or advised by a healthcare provider to quarantine due to COVID-19;
5. The employee is caring for a child if the child's school has been closed or childcare provider is unavailable due to COVID-19; or
6. The employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services.

However, the Act allows employers of employees who are healthcare providers or emergency responders to elect to exclude such employees from entitlement to emergency paid sick leave. There are also special provisions for employers and employees working under multi-employer collective bargaining agreements.

Under the Act, for employees entitled to emergency paid sick leave, employers must provide: (a) full-time employees with 80 hours of paid sick leave, and (b) part-time employees with paid sick leave in an amount equal to the number of hours the employee works on average over a two-week period. For both full-time and part-time employees, the monetary amount of paid sick leave is the greater of the employee's regular rate of pay or applicable minimum wage capped at $511 per day

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($5,110 in the aggregate) if used for reasons (1) through (3) above. But, if used for reasons (4) through (6) above, the monetary amount of paid sick leave is 2/3 of the employee's regular rate or applicable minimum wage up to $200 per day ($2,000 in the aggregate).[1] Although the Act requires employers to pay for the emergency paid sick leave, the federal government will reimburse employers for the cost of emergency paid sick leave through a dollar-for-dollar tax credit. For more information regarding the tax credit, please see the Alert on this topic.

The employer's obligation to provide emergency paid sick leave stops beginning at the employee's next scheduled shift following the end of the need that entitled the employee to paid sick leave. Otherwise, the emergency paid sick leave provisions under the Act expire on December 31, 2020, with no carryover of emergency paid sick leave.

The Act gives employees the choice to use emergency paid sick leave prior to any other paid leave. In other words, employers cannot require that employees use other forms of paid leave prior to exhausting emergency paid sick leave. Employers are also prohibited from requiring employees to find cover for an absence to take emergency paid sick leave. And employers are prohibited from retaliating against employees for using emergency paid sick leave or filing a complaint or participating in a proceeding under the Act.

Employers must also provide employees with notice of their right to emergency paid sick leave by posting the notice provided by the Secretary of Labor, which the Department of Labor has now published. The emergency paid sick leave provisions of the Act are effective on April 1, 2020.

Emergency Leave under FMLA

In addition to this initial leave, the Act also amends the Family and Medical Leave Act (FMLA) to provide emergency leave with respect to COVID-19. These amendments also apply to private-sector employers with fewer than 500 employees but, in contrast to the Emergency Paid Sick Leave, which applies to all employees, only employees who have been employed for at least 30 calendar days are eligible for this additional FMLA leave. Under the Act, employers must provide up to 12 weeks of job-protected leave for "a qualifying need related to a public health emergency" related to COVID-19 but what qualifies as a "qualifying need" is narrower than under Emergency Paid Sick Leave. Under the FMLA amendment, a "qualifying need" for leave is limited to reason (5) in the previous section, namely, circumstances where an employee is unable to work (or telework) because the employee must care for a minor child when the child's school or place of child care has been closed or regular child care is unavailable due to a public health emergency. Employees who take this emergency leave under the FMLA are generally entitled to job restoration following the leave. However, an employer with fewer than 25 employees is not required to provide job restoration if the employee's position was eliminated due to changes in operation caused by the public health emergency, following an employer's reasonable efforts. Smaller employers also have an obligation to contact an eliminated employee if an equivalent position becomes available within a year.

The first ten days of public health emergency leave can be unpaid, but the employee may elect to use accrued paid sick leave (such as that received under state or local law), PTO, or emergency paid sick leave under the Act. The remainder of public health emergency leave must be paid at two-thirds of the employee's regular rate, based on the number of hours the employee would otherwise be scheduled to work. If the employee's schedule varies from week to week, the employer can use the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes leave. If the employee did not work over that period, the employer can use the reasonable expectation of the employee at the time of hiring of

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the average number of hours per day that the employee would normally be scheduled to work. This paid leave is capped at no more than $200 per day and $10,000 in the aggregate.

Stimulus to Unemployment Insurance

Last week, the federal government issued new guidance that provides flexibility to states to modify unemployment insurance benefits laws for certain COVID-19 related scenarios:

> Under the guidance, federal law permits significant flexibility for states to amend their laws to provide UI benefits in multiple scenarios related to COVID-19. For example, federal law allows states to pay benefits where: (1) an employer temporarily ceases operations due to COVID-19, preventing employees from coming to work; (2) an individual is quarantined with the expectation of returning to work after the quarantine is over; and (3) an individual leaves employment due to a risk of exposure or infection or to care for a family member. In addition, federal law does not require an employee to quit in order to receive benefits due to the impact of COVID-19.

U.S. Department of Labor Press Release.

As quarantines and social distancing force businesses to close their doors, employers may be left with no choice but to lay off employees or cut hours. In such situations, affected employees will likely turn to state unemployment insurance for income. Given the scale of the COVID-19 pandemic, state unemployment insurance programs are under significant strain. The Act provides further support for unemployment insurance programs by providing a much-needed financial stimulus.

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[1] Employees taking paid sick leave for reason (5), related to caring for a child, also are eligible for up to additional 10 weeks of paid FMLA leave as discussed in the following section.

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