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Employer Obligations Under The Families First Coronavirus Response Act

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On March 18, 2020, the President signed into law the Families First Coronavirus Response Act (the "Act"). The full text of the law can be found here: https://www.congress.gov/bill/116th-congress/house-bill/6201/text. The Act, which takes effect on April 1, 2020, applies to government employers and private employers with less than 500 employees. This alert discusses the Act's three major components applicable to private employers.

Emergency Family And Medical Leave Expansion Act (Division C of the Act)

The Act establishes the Emergency Family And Medical Leave Expansion Act (the "EFMLA"), which amends the Family and Medical Leave Act ("FMLA") to add a new category of leave where (1) an eligible employee is unable to work or telework due to a need for leave to care for the employee's minor son or daughter if their school or place of care has been closed or (2) the child care provider is unavailable, due to an emergency with respect to COVID-19 declared by a Federal, State, or local authority ("Childcare Leave").

Which Employers Are Subject To The EFMLA? Employers with less than 500 employees must comply with the EFMLA. The EFMLA does not distinguish between part-time or full-time employees. The Act does not specifically address the time period that is analyzed for purposes of determining the 500-employee threshold.

It also does not address whether subsidiaries of a parent corporation will be combined for purposes of determining total employee count, although the FMLA's regulations regarding an "integrated employer" *may* provide guidance. Under 29 C.F.R. § 825.104(c) (which is not incorporated into the EFMLA), where one corporation has an ownership interest in another corporation, it is a separate employer, *unless* the entities are not separate entities and instead are an "integrated employer." This FMLA-specific regulation notes that this inquiry is not determined by any single fact, but rather the entire relationship between the business entities.

Factors considered in determining whether two or more entities are an "integrated employer," such that they will be deemed as part of a single employer, include:

1. Common management;
2. Interrelation between operations;
3. Centralized control of labor relations; and
4. Degree of common ownership/financial control.

Because the integrated employer test is not specifically incorporated into the EFMLA, employers must proceed with caution on this issue and are advised to consult with counsel.

Who Is An Eligible Employee? Employees who have been employed for at least 30 calendar days by an employer with less than 500 employees.

How Much Childcare Leave Is Available? An eligible employee may take up to 12 workweeks of leave during any 12-month period where the employee is unable to work (or telework) due to a need for Childcare Leave. Note that where an employer has placed an employee on a furlough, as many employers have been forced to do in response to government-ordered closures, an employee cannot seek Childcare Leave because the employee's inability to work is not due to the employee's need to take a leave of absence.

Is Childcare Leave Paid? The first 10 days is unpaid, but employees may *choose* to substitute any accrued vacation leave, personal leave, or medical or sick leave for this unpaid leave. After the first 10 days, the employer must pay Childcare Leave at two-thirds of an employee's regular rate of pay, for the number of hours the employee would otherwise be normally scheduled to work (with special rules for employees with irregular schedules). Employers can cap the pay per individual employee at: $200 per day and $10,000 in the aggregate.

Are Employees Who Take Childcare Leave Guaranteed Reinstatement? Employees taking Childcare Leave are generally entitled to return to the same or equivalent position (with an exception for small employers with fewer than 25 employees).

Emergency Paid Sick Leave Act (Division E of the Act)

The Act also establishes the Emergency Paid Sick Leave Act (the "EPSLA"), to provide employees with certain paid sick leave benefits related to the COVID-19 crisis ("EPSL").

Which Employers Are Subject To The EPSLA? Employers with less than 500 employees must comply with the EPLSA. The EPLSA does not distinguish between part-time or full-time employees and does not address the time period that is analyzed for purposes of determining the 500-employee threshold or whether subsidiaries of a parent corporation will be combined for purposes of determining total employee count.

Who Is An Eligible Employee? All employees of a covered employer are eligible for EPSL regardless of their length of employment.

What Reasons Qualify For EPSL?

This paid sick time must be provided if an employee is unable to work (or telework) due to a need for leave because of any of the following reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related 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 symptoms of COVID-19 and seeking a medical diagnosis.

4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.

6. 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 the Secretary of Labor.

Exceptions may apply for health care providers and emergency responders.

How Much EPSL Is Available? An eligible employee is entitled to either: (i) for full-time employees - 80 hours of EPSL, or (ii) for part-time employees - an amount equal to the number of hours the employee works on average over a 2-week period.

EPSL must be paid for the number of hours the employee would normally be scheduled to work (with special rules for employees with irregular schedules) at the following rates:

- Leave for reasons (1)-(3), above, must be paid at the employee's full regular rate of pay. Total pay can be capped per individual at $511 per day and $5,110 in the aggregate.

- Leave for reasons (4)-(6), above, must be paid at two-thirds of the employee's regular rate of pay. Total pay can be capped per individual at: $200 per day and $2,000 in the aggregate.

Employees may use EPSL prior to using other paid leave provided by the employer; the employer cannot require an employee to use other paid leave offered by the employer first.

What If The Employer Already Provides Paid Sick Leave Benefits? The EPSLA is unclear. The original version of the law that was approved by the House stated that emergency paid sick leave was in addition to other paid sick leave provided by the employer. This language is not in the final version of the EPSLA signed by the President. The prevailing view is that EPSL is in addition to existing employer-provided paid sick leave based on a vague provision in the law that states that an "employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under" the EPLSA.

Does An Employer Have To Pay Out Unused EPSL? No. EPSL does not carry over from year to year, and employers are not required to pay it out upon separation of employment.

Tax Credits For Paid Leave (Division G of the Act)

For both the EFMLA and the EPSLA, a tax credit will be made available to employers "for each calendar quarter [in] an amount equal to 100 percent" of the qualified Caregiver Leave wages or EPSL wages paid by the employer. There are some restrictions on these tax credits, but generally the restrictions appear to align with the caps employers are permitted to impose on the amounts of paid leave. Employers should further consult with their tax adviser regarding the implications of the Act.

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