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The Families First Coronavirus Response Act: A Guide for Employers

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As part of the federal government's response to the COVID-19 pandemic, the Families First Coronavirus Response Act, P.L. 116-127 (the "FFCRA") was enacted on March 18, 2020. Its effective date is April 2, 2020 and its provisions expire on December 31, 2020. Numerous provisions of the legislation have a direct impact on employers.

This Guide highlights the four main impacts of the FFCRA on employers: 1) new requirements for emergency paid sick leave for employers with fewer than 500 employees; 2) expanded Family and Medical Leave Act of 1993 ("FMLA") leave for employers with fewer than 500 employees; 3) health insurance expansion for COVID-19 testing; and 4) refundable payroll tax credits for affected employers.

NEW REQUIREMENTS FOR EMERGENCY PAID SICK LEAVE

The FFCRA mandates that employers provide two weeks of paid sick leave to employees affected by the COVID-19 pandemic. This requirement applies to private employers with fewer than 500 employees and to all public employers.

The FFCRA requires that paid sick leave be provided when an employee is unable to work or telework because the employee: 1) is subject to a government quarantine or isolation order related to COVID-19; 2) has been advised by a health care provider to self-quarantine due to COVID-19 concerns; 3) is experiencing symptoms of COVID-19 and is seeking a diagnosis; 4) is caring for an "individual" who is subject to an order or advisement described in 1) or 2) (notably, the FFCRA provides no definition of "individual;" therefore, the definition does not appear to be limited to family members); 5) is caring for a child whose school or place of care is closed or whose childcare provider is unavailable due to COVID-19; or 6) is experiencing a "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.

The amount that the employee must be paid under the FFCRA depends on the reason for the leave. If the reason relates to a quarantine or an individual seeking a diagnosis (items 1 through 3 above), the employee is paid 100 percent of his or her regular rate of

pay multiplied by the number of hours of paid sick leave, subject to a cap of \$511 per day and \$5,110 total. For any other reason, the employee is paid two-thirds of his or her regular rate of pay multiplied by the number of hours of paid sick leave, subject to a cap of \$200 per day and \$2,000 total.

Payments to an employee required by the FFCRA will be taxable income to the employee and subject to the employee's share of payroll taxes, but not to the employer's share.

No waiting period for these paid sick leave benefits is permitted, meaning employees are eligible to receive these benefits immediately upon hire. This paid sick leave will not carry over to the following year and may be used in addition to any paid sick leave currently provided by employers. This law does not create a requirement to pay for unused emergency paid sick leave upon termination, nor does it apply retroactively. Full-time employees are entitled to 80 hours of paid sick time, with part-time employees entitled to paid sick time in an amount equal to the average number of hours they work during a two-week period. The United States Department of Labor ("USDOL") is expected to issue additional guidelines regarding the calculation of paid sick leave under the FFCRA within 15 days of enactment of the legislation (i.e., by April 2, 2020).

Employers are required to post a notice regarding these new paid sick leave requirements in a conspicuous place in the workplace. There are no certification requirements. However, an employer may require an employee to follow reasonable notice procedures following the first workday (or portion thereof) on which an employee elects to take this paid sick leave. An employer may not require an employee utilizing the leave to search for or find a replacement employee to cover the hours missed. An employer may not discipline, discharge or discriminate in any manner against an employee who takes this paid sick leave.

Failure to provide this paid sick leave may subject the employer to requirements to pay both back pay and statutory damages equal to the amount of back pay. As is the case with the Emergency FMLA leave outlined below, the USDOL is granted the authority to issue regulations to exclude certain health care providers and emergency responders from the definition of eligible employee and to exempt small businesses with fewer than 50 employees from these paid sick leave requirements when compliance would jeopardize the viability of the business as a going concern.

EXPANDED FMLA LEAVE FOR EMPLOYERS WITH FEWER THAN 500 EMPLOYEES

The FFCRA amends the FMLA to provide for an additional type of family leave. It allows for 12 weeks of Emergency FMLA leave to care for a minor child if his or her school or place of care is closed or otherwise unavailable due to an emergency related to COVID-19 as declared by a governmental authority. This portion of the FFCRA applies to private sector employers with fewer than 500 employees and to all public sector employers.

Employees are eligible for this new type of Emergency FMLA leave after only 30 days of employment, as opposed to 12 months for most traditional FMLA leave. This new type of FMLA leave is unpaid for 10 days, with the potential for the remainder of the FMLA leave

period paid at two-thirds of the employee's regular pay, capped at \$200 per day and \$10,000.00 in the aggregate per employee. Employees are permitted to substitute paid vacation or personal, medical, or sick leave during the unpaid portion of the leave, or a qualifying employee may utilize the two weeks of paid sick leave provided under this Act.

In any case in which the necessity of the Emergency FMLA leave is reasonably foreseeable, an employee is required to provide the employer with notice of this leave. There are, however, no certification provisions and paid Emergency FMLA leave under the FFCRA is not available retroactively. Employers with 25 or more employees will have the same obligation as under the traditional FMLA rules to return any employee who has taken Emergency FMLA leave to the same or an equivalent position upon the employee's return to work. However, 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.

As is the case with the emergency paid sick leave provisions, the FFCRA grants the USDOL authority to exclude health care providers and emergency responders from the definition of employees who are allowed to take Emergency FMLA leave and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of the business as a going concern.

Both the FMLA expansion and new paid sick time requirements will take effect on April 2, 2020, 15 days after the enactment of the law. These provisions will expire at the end of 2020. As discussed below, employers will be given tax credits for Emergency FMLA leave wages and emergency paid sick leave paid under the FFCRA.

HEALTH INSURANCE EXPANSION FOR COVID-19 TESTING

The FFCRA significantly impacts group health plan sponsors. Specifically, group health plans are required to provide coverage for testing for COVID-19 without cost sharing (such as deductibles, copayments, coinsurance, or prior authorization requirements). These new rules apply to both grandfathered and non-grandfathered plans, and there is no exception for employers with more than 500 employees.

The law requires group health plans to cover the cost of approved products to diagnose or detect SARS-CoV-2 and the virus that causes COVID-19 and related services performed by health care providers in connection with this testing. Coverage is required only to the extent that the diagnostic services relate to the furnishing or administration of covered testing or related services or relate to the evaluation of the individual to determine whether covered testing is needed.

Covered services and related cost waivers apply to diagnostic testing, health care provider services (in-person and telehealth), and facility costs (physician office, urgent care center and emergency room) to the extent the costs are related to evaluating the

need for or furnishing COVID-19 diagnosis and treatment. Plans cannot mandate prior authorization or similar medical management requirements as a precondition of COVID-19 testing or services and are forbidden to impose limitations on where the diagnosis or treatment is performed.

These provisions are effective on March 18, 2020, but only for tests and services performed on or after that date.

REFUNDABLE PAYROLL TAX CREDITS FOR EMPLOYERS

Finally, the FFCRA provides employers with a refundable payroll tax credit which is designed to offset the cost of the emergency paid sick leave and Emergency FMLA provisions. For these purposes, “payroll taxes” include the employer’s portion of FICA (unemployment) and Medicare taxes. The tax credits will be administered by the IRS and credited against employer-side payroll tax liability, with any excess refunded to the employer.

It is important to note that this tax credit applies only to employers required to provide these expanded benefits under the FFCRA. In other words, employers who voluntarily provide these or similar benefits and employers who are not subject to the FFCRA are not eligible for the credit.

Details on this tax credit and how it will be administered will be provided in future IRS guidance. Like the rest of the FFCRA, the tax credit expires on December 31, 2020.

We at Smith Debnam are monitoring this situation closely as part of our comprehensive response to the COVID-19 pandemic. If you have any questions, please human resources law partner Connie Carrigan at (919) 250-2119 or e-mail her at ccarrigan@smithdebnamlaw.com.

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