

## **COVID-19 Response Legislation Signed Into Law**

### **What is the Impact on Employers?**

**March 19, 2020**

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Yesterday, the U.S. Senate approved the COVID-19 response legislation previously passed by the U.S. House of Representatives, and President Trump signed it into law. It provides for a number of measures to assist Americans who are facing overwhelming and daunting challenges created by the coronavirus pandemic. Several of the measures are of specific interest to employers:

#### Emergency Family and Medical Leave Expansion Act

The Expansion Act mandates the provision of 12 weeks of job-protected FMLA leave for an eligible employee who is “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable” due to “an emergency with respect to COVID-19 declared by a Federal, State or local authority.” The first 10 days of the leave will be unpaid, unless the employee elects to use any accrued paid time (vacation, personal, medical or sick) available to him/her. Thereafter, the employer is responsible for providing paid leave for the remaining FMLA time available to the employee. The employee shall be paid no less than 2/3 of the employee’s regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work. There is a cap on this mandated paid leave - \$200 per day and \$10,000 in the aggregate.

This leave is job protected, meaning that the employee, at the conclusion of the FMLA leave period, must be reinstated to his/her prior position, or a position that is equivalent to the employee’s job at the time leave was commenced. This right to reinstatement, however, does not apply to an employer who employs fewer than 25 employees, and the following conditions are met:

- The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in an employer’s operations that impact employment and are caused by a public health emergency;
- The employer makes reasonable efforts to restore the employee to an equivalent position; and
- If the employer’s reasonable efforts fail, it makes reasonable efforts to contact the employee if an equivalent position becomes available within one year, beginning on the earlier of the date on which the employee’s need for the leave concludes (i.e. the son or daughter return to school) or the date 12 weeks after the employee’s leave commences.

The Expansion Act applies to employers with 500 or less employees, and provides these new FMLA rights to employees who have been employed by the employer for at least 30 calendar days.

The Secretary of Labor is granted the authority to issue regulations to exempt employers with fewer than 50 employees from the FMLA expansion requirements if imposition of them would jeopardize the viability of the business as a growing concern. In addition, employers of health care providers or emergency responders may exclude these employees from receiving the entitlements provided by this FMLA expansion.

The Expansion Act becomes effective 15 days after its enactment, and ends on December 31, 2020.

#### Emergency Paid Sick Leave Act

The Paid Sick Leave law requires private employers, who employ fewer than 500 employees, and covered public employers to provide employees, regardless of how long they have been employed by the employer, paid sick time when the employee is unable to work (or telework) because:

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 that is either subject to a Federal, State or local quarantine or isolation order related to COVID-19, or advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. The employee is caring for a son or daughter 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; or
6. The employee is experiencing any other substantially similar conditions, as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

Full-time employees are entitled to 80 hours of paid sick time, and part-time employees are entitled to payment for the number of hours the employee regularly works, on average, over a 2-week period. If the employee is using the sick time for one of the reasons listed in 1-3 above, the compensation should be paid to the employee at the employee's regular rate of pay. If the employee is using the sick time for one of the reasons listed in 4-6 above, the compensation should be paid to the employee at the rate of 2/3 of the employee's regular rate of pay. There is a cap on this mandated paid sick time - \$511 per day and \$5,110 in the aggregate if used for reasons 1-3 above, and \$200 per day and \$2,000 in the aggregate if used for reasons 4-6 above. If unused, the paid sick time will not carry over into the following year, and an employer need not pay out the unused paid sick time at the end of the employee's employment.

An employer cannot require an employee to use any other paid leave provided by the employer before the paid sick time under this new Act is used. An employer also may not, as a condition to receiving the paid sick time, require an employee to find a replacement to cover the hours that would otherwise be worked by the employee.

The Secretary of Labor is granted with the authority to issue regulations to exempt an employer with fewer than 50 employees from the paid sick time requirement if the imposition of it would jeopardize the viability of the business as a going concern. In addition, employers who employ health care providers or emergency responders may exclude these employees from entitlement to the paid sick time.

An employer may not discriminate or retaliate against an employee for exercising his/her rights under this new Emergency Paid Sick Leave Act. Penalties will be imposed against employers who fail to comply with the provisions of the Act.

The law becomes effective no later than 15 days after its enactment, and expires on December 31, 2020.

#### Tax Credits for Paid Sick and Paid Family and Medical Leave

To offset the cost that will be incurred by employers, the new law includes the provision of refundable tax credits for employers that will be applied against the employer portion of Social Security taxes. The credit will be allowed each calendar quarter in an {B2152429.1}

amount equal to 100% of the wages paid by the employer in accordance with the FMLA expansion and paid sick time requirements.

#### Guidance from the Secretary of Labor

The Secretary of Labor must provide a model notice for employers to post that explains the requirements of the new laws. This notice must be provided within 7 days of the law's enactment. The Secretary of Labor, within 15 days of enactment, must also issue guidelines for calculating wages of part-time employees. It is expected that these guidelines will cover other aspects of the new laws as well.

For more information on the provisions of these new laws, or for assistance with other employment-related questions pertaining to the COVID-19 pandemic, please contact:

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