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On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“FFCRA”) into law, effective within 15 days—however, The Department of Labor has issued guidance that states that the law becomes effective as of April 1, 2020. Although the FFCRA is still a work in process with additional changes proposed, I have summarized below the Act as it currently stands to help you navigate through these complicated waters. If you have additional questions, please reach out to us.

Expands the Family and Medical Leave Act for a “Public Health Emergency”

The FFCRA expressly amends the Family and Medical Leave Act with specific changes related to the coronavirus pandemic.

- **Effective Date and Expiration:** This program will become effective on **April 1, 2020**, and remains in effect until **December 31, 2020**.
- **Expanded Coverage and Eligibility:** The Act significantly amends and expands the FMLA temporarily. The current employee threshold for FMLA coverage would change from only covering employers with 50 or more employees to instead covering all employers with fewer than 500 employees. It also lowers the eligibility requirement in that any employee who worked for the employer for at least 30 days (instead of 12 months) before the designated leave may be eligible to receive paid family and medical leave.
- **Healthcare Providers and Emergency Responders Exemption:** The Act provides that employers of healthcare providers or emergency responders may refuse such employees leave.

“Health Care Providers” excluded from FFCRA are defined as:

Anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home,

home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility.

This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

“Emergency Responders” excluded from the FFCRA are defined as:

An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19.

This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

Despite the above noted ability to exclude “Health Care Providers” and “Emergency Responders” from the FFCRA, the DOL advises that: “the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.”.

- **Small Business Exception:** Private employers with fewer than 50 employees may seek an exemption of this provision from the Secretary of Labor for good cause when providing the leave required of this Act would jeopardize the viability of their business. A small

business may claim this exemption if an authorized officer of the business has determined that:

- The provision of emergency paid sick leave or expanded FMLA would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting emergency paid sick leave or expanded FMLA would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Private employers with fewer than 50 employees may not be sued in private actions by employees but are subject to civil and administrative actions by the DOL.

There is also a limited exception to the job restoration requirement for employers with fewer than 25 employees discussed below

- **Reasons for "Emergency FMLA Leave":** Until December 31, 2020, public employers and private employers with fewer than 500 employees, who have been on the job for at least 30 days have the right to take up to 12 weeks of job-protected leave for a "Public Health Emergency," which essentially means an inability to work due to the need to care for the employee's child (under 18 years of age) if their school has been closed or their child care provider is unavailable due to COVID-19. The DOL has determined that "child under the age of 18 years of age" includes a child 18 years of age or older and incapable of self-care because of a mental or physical disability consistent with the FMLA regulations.

Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee's child needs.

- **Supporting Documentation:** To establish the entitlement to the leave and thus the employer's right to the tax credits for the leave, an employee is required to provide the employer documentation prior to taking Emergency Paid Sick Leave or Emergency FMLA Leave that contains the following information (1) employee's name; (2) date(s) for which leave is requested; (3) qualifying reason for the leave; and (4) an oral or written statement that the Employee is unable to work because of the qualified reason for leave.
- **Paid Leave:** The first ten days of "Emergency Leave" may be unpaid under the Emergency FMLA Leave Act. However, under the accompanying Emergency Paid Sick Leave Act, it

provides for paid time off (at two-thirds the employee's regular rate of pay) for these initial first two weeks. After the ten days, the employer generally must pay full-time employees at two-thirds (2/3) the employee's regular rate for the number of hours the employee would otherwise be normally scheduled to work. The Act limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee for up to ten (10) weeks.

As discussed below in the Emergency Paid Sick Leave section, the first two week of Emergency FMLA is actually required to be paid under the Emergency Paid Sick Leave Act.

An employer may also require an employee to utilize any accrued paid leave (like vacation or sick leave) to cover the difference in the two-thirds pay and 100% of pay.

- **Full-time Employees:** Full-time employees are those defined as working at least 40 hours a week
- **Calculating Pay for Part-Time Employees:** A part-time employee is any employee regularly working less than 40 works a week. Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee would be normally scheduled to work a day over a two-week period. This is arrived at by 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, including hours for which the employee took leave of any type. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period.
- **Carryover and Interaction with Other Paid Leave:** This paid sick leave will not carry over to the following year and may be in addition to any paid sick leave currently provided by employers.
- **Furloughed or Laid Off Employees:** The DOL has clarified that employees on layoff or furlough are not entitled to benefits under FFCRA until they return to work:

Generally, if an employer sent an employee home and stopped paying the employee because it does not have work for the employee to do, the employee will not get paid sick leave or expanded FMLA, but the employee may be eligible for unemployment benefits.

This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local order, such as a Stay-At-Home Order, before or after April 1, 2020.

If an employer closes after April 1, 2020, while an employee is on paid sick leave or expanded FMLA, the employer must pay for any paid sick leave or expanded

FMLA the employee used before the employer closed. As of the closure date, the employee is no longer entitled to paid leave but may be eligible for unemployment benefits.

If an employee is furloughed (e., temporarily laid off) or the employee's hours are reduced because of lack of work or business, the employee is not entitled to then take paid sick leave or expanded FMLA but may be eligible for unemployment benefits.

- **Job Restoration:** Generally, an employee taking Emergency Leave must be returned to his/her same or equivalent position following leave. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists following the Emergency Leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency Leave. 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.
- **Notice Posting:** All employers covered by the paid sick leave and expanded family and medical leave provisions of the FFCRA (i.e., certain public sector employers and private sector employers with fewer than 500 employees) are required to post the Model Notice developed by the Secretary of Labor.
- **No Retaliation:** Employers may not retaliate against, discharge, or discipline employees because the employee took leave under this provision. This No Retaliation provision would not preclude an employer from making a company-wide layoff decision based on economic reasons. However, if the employer targeted for layoff only those employees who are eligible for leave under the Act or who have requested leave, then it would probably run afoul of this provision.
- **Continuing Insurance Benefits:** Employees who are laid off generally are no longer eligible to participate in their employer's health benefit plan. After a layoff, former employees with benefits provided by a COBRA-covered employee are eligible for COBRA continuation coverage. An employer may choose, but is not required, to cover some or all of the cost of COBRA benefits to its laid-off employees. Employers should provide standard COBRA election notices and otherwise follow their standard COBRA procedures for separated employees at the time of the layoff. Employees placed on leave by the employer due to a quarantine order or taking Emergency Leave should have their health insurance continued during the term of the leave.

The Emergency Paid Sick Leave Act

The FFCRA also contains another provision that provides that public and private employers with fewer than 500 employees must provide up to two weeks' pay for **emergency paid sick leave** to full-time employees and part-time employees based on average hours worked. Unlike the 30-day requirement under the Emergency FMLA Leave Act, **employees are eligible for this emergency paid leave, regardless of how long they have been employed.**

- **Effective Date and Expiration:** This program will become effective on **April 1, 2020**, and remains in effect until **December 31, 2020**.
- **Paid Sick Leave:** The Act allows all employees of private employers with 500 employees or less, regardless of how long they've been employed, up to two weeks of emergency paid sick leave. Employees will be eligible if they are unable to work (or telework) because the employee is:
 1. subject to a federal, state or local quarantine or isolation order related to COVID-19;
 2. advised by a health care provider to self-quarantine due to COVID-19 concerns;
 3. experiencing COVID-19 symptoms and seeking medical diagnosis;
 4. caring for an individual (note – not just family members) subject to a federal, state or local quarantine or isolation order, or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 5. caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
 6. 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.

If a business makes a decision to close or cancel work shifts for business reasons (i.e., lack of work), neither emergency paid sick leave nor expanded family leave will apply as they are available only to employees who are not working due to the specified reasons listed above, not including their employer's decision to cease or reduce operations.

- **Paid Time Off:** If an employee is out for reasons 1-3 listed above, emergency paid sick leave must be paid at the employee's regular rate of pay for up to two weeks, but is capped at \$511/day and \$5,110 in the aggregate per employee. If an employee is out for reasons 4-6 listed above, emergency paid sick leave must be paid at two-thirds (2/3) the employee's regular rate of pay for up to two weeks, and is capped at \$200/day and \$2,000 in the aggregate per employee.
- **Vacation/PTO:** Employers may not require employees to use vacation, PTO or other forms of paid leave before using emergency paid sick leave.

- **Small Business Exception:** Same as under Emergency FMLA leave Act, discussed above.
- **Full-time Employees:** Same as under Emergency FMLA leave Act, discussed above.
- **Calculating Paid Leave for Part-time Employees:** Same as under Emergency FMLA leave Act, discussed above.
- **Healthcare Providers and Emergency Responders Exemption:** Same as under Emergency FMLA leave Act, discussed above.
- **Furloughed or Laid Off Employees:** Same as under Emergency FMLA leave Act, discussed above.
- **Carryover and Interaction with Other Paid Leave:** Same as under Emergency FMLA leave Act, discussed above.
- **Supporting Documentation:** Same as under Emergency FMLA leave Act, discussed above.
- **Job Restoration:** Same as under Emergency FMLA leave Act, discussed above.
- **Notice Posting:** Same as under Emergency FMLA leave Act, discussed above.
- **No Retaliation:** Same as under Emergency FMLA leave Act, discussed above.
- **Continuing Insurance Benefits:** Same as under Emergency FMLA leave Act, discussed above

Tax Credits for Emergency Paid Sick Leave and Emergency Paid FMLA Leave

Many small-business owners are worried about how to pay for these benefits, especially at a time when business across numerous industries has basically come to a halt. The FFCRA provides that employers subject to the Emergency Paid Sick Leave and the Expanded FMLA Emergency Paid FMLA Leave requirements are entitled to fully refundable tax credits to cover the cost of the leave required to be paid for these periods of time during which employees are unable to work (which for purposes of these rules, includes telework). If Emergency Paid Sick Leave or Emergency Paid FMLA leave ends up costing more than the tax credits, the U.S. government will send the employer a check to cover the paid leave costs above the tax credits.

Unemployment Insurance

An additional 13-weeks of funding is provided to states for processing and paying unemployment insurance benefits. The unemployment benefits have been expanded in an attempt to replace the average worker's paycheck. The bill provides that eligible employees will receive will get an extra \$600 per week on top of their state unemployment benefit. For example, let's say a worker was making \$600 per week in Tennessee; she'd be eligible for the maximum state unemployment benefit of \$275 per week. Under the new expansion, the worker would get an additional \$600 of federal pandemic unemployment compensation, for a total of \$875. Employees are eligible to receive this extra \$600 per week in emergency federal unemployment compensation through July 31, 2020.

Any payments made by an employer to an employee while unemployed "currently" reduces the amount of unemployment an employee can receive. For example, if an employee is terminated and receives two weeks' pay as severance, then the employee is not eligible for unemployment for two weeks to prevent double dipping.

Insurance Coverage for COVID-19 Testing

The Act requires private health plans (including insured, self-insured, and grandfathered) to provide coverage for COVID-19 diagnostic testing and related services to employees and their covered dependents, without cost sharing (like deductibles, copayments, and coinsurance) from the enactment of the Act through the end of the national emergency period.

Covered services and related cost waivers apply to diagnostic testing, healthcare 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. Besides coverage and cost waiver provisions, plans shall not require prior authorization or similar medical management requirements as a precondition of COVID-19 testing or services.