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THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT: WHAT EMPLOYERS NEED TO KNOW

In response to the spread of COVID-19, President Trump on March 17, 2020 signed into law the Emergency Families First Coronavirus Response Act (H.R. 6201, or the “Act”). The Act has two main sections expanding paid employee leave, including 10 days (80 hours) of immediate paid sick leave, and up to 12 weeks of job-protected paid leave related to COVID-19 under the Family Medical Leave Act (FMLA). The Act provides employers tax credits for the paid sick leave. It took effect on April 1, 2020.

SECTION ONE: EXPANDED FMLA COVERAGE

The Act provides for a significant expansion of FMLA coverage for Coronavirus-related reasons, including paid leave after 10 days of unpaid leave. As you know, FMLA previously provided up to 12 weeks of unpaid leave for various medical reasons including an employee’s own serious health condition or to care for a sick family member.

The Act expands this coverage to employees who are unable to work (or telework) due to the need to care for the employee’s son or daughter under 18 years old, if their school or place of care has been closed, or their child care provider is unavailable due to a public health emergency. Public health emergency is defined as an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

Unlike the FMLA, which applies to employers with 50 or more employees, the Act applies to all employers with fewer than 500 employees. Employers with less than 50 employees may be eligible for an exemption if the Act’s obligations “would

jeopardize the viability of the business as a going concern.” Employers with fewer than 25 employees are exempted from the obligation to restore an employee to their position once leave has ended, if the position held by the employee when the leave commenced no longer exists due to economic conditions or changes in the employer’s operating conditions caused by a public health emergency, and subject to certain additional conditions.

These expanded FMLA provisions cover all employees (full- and part-time) who have been employed for at least 30 days.

Employers will be required to pay an eligible employee up to two-thirds of the employee’s regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work, subject to a cap of \$200 per day and \$10,000 in the aggregate.

Employers will receive a tax credit for required paid family leave, as well as other special tax handling. The IRS has provided [guidance](#) on needed documentation.

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 [Link to Families First Coronavirus Response Act: Temporary Regulations](#)

 [Link to Families First Coronavirus Response Act: Questions & Answers](#)

SECTION TWO: EMERGENCY PAID SICK LEAVE

In addition to the above FMLA expansion, the Act requires employers to provide paid sick time to the extent an employee is unable to work (or telework) due to a need for leave because the employee:

- Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Is caring for an individual who is subject to a quarantine order or has been advised by a health care provider to self-quarantine;
- Is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions; or
- Is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under these provisions, employees are entitled to up to 80 hours of paid sick time (prorated for part-time employees). This pay is the employee's regular rate of pay, capped at \$511 per day per employee and \$5,110 in the aggregate, to take personal sick leave, and two-thirds of the employee's regular rate of pay, capped at \$200 per day per employee and \$2,000 in the aggregate, to care for a family member. These provisions cover all employers with fewer than 500 employees, subject to a limited small-employer exemption described in Section Three.

This paid sick time must be immediately available for each employee regardless of how long an employee has been employed. Paid sick time under these provisions does not carry over from one year to the next, and it does not have to be paid out at termination or other separation of employment if it has not been used. An employer may not require that an employee search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

Failure to pay this sick leave will be considered a failure to pay minimum wages and subject to penalties. Further, it is unlawful for an employer to discharge, discipline, or in any other manner discriminate against any employee who takes leave under the paid sick leave provisions, or who has filed any complaint or testifies in any proceeding relating to the leave.

SECTION THREE: THE SMALL-EMPLOYER EXEMPTION

DOL regulations shed some light on which small companies may be exempt from providing some of the new paid leave, and how the exemption can be elected and documented. Specifically, the regulations state:

"An Employer... with fewer than 50 Employees (small business) is exempt ... when the imposition of such requirements would jeopardize the viability of the business as a going concern. A small business under this section is entitled to this exemption if an authorized officer of the business has determined that:

- (i) The leave requested ... 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;

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- (ii) The absence of the Employee or Employees requesting leave under [the new law] would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
 - (iii) 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 leave ... and these labor or services are needed for the small business to operate at a minimal capacity.”

The exemption only applies to leave due to school closure or the unavailability of a child care provider. To elect the small business exemption, a small employer must document that a determination has been made pursuant to the criteria set forth above. The employer should not send such documentation to the DOL, but rather retain the records in its files. Finally, the regulations clarify that regardless of whether a small employer is exempt, the employer is still required to post the mandatory notice.

Like the paid family leave, employers will receive a tax credit for required paid sick leave, as well as other special tax handling.

NEXT STEPS

The federal Secretary of Labor published a [model notice](#) about these provisions. The notice must be posted by all employers even if an exemption applies.

Employers should continue to monitor the legal landscape as federal, state, and local mandates continue to evolve during this COVID-19 emergency.

Employers should also be proactive in their preparedness efforts, including reviewing their sick leave and family medical leave policies, and investigating and documenting all employee absences and leave requests. ■

Finch, Thornton & Baird, LLP is here for you as the impact of Coronavirus is felt throughout your business. For more information, please contact Chad T. Wishchuk, Esq. at (858) 737-3100.

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