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Families First Coronavirus Response Act

Signed into Law

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We recently advised you of proposed federal legislation responding to the COVID-19 pandemic. On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “CRA”). Subsequent to our March 18, 2020 Bulletin, the House made several technical corrections, narrowing some aspects of the original version of the bill, which is the version ultimately signed by President Trump.

As enacted, the legislation:

- Mandates all employer-sponsored health plans cover COVID-19 testing.
- For U.S. private employers with less than 500 employees and all public agency employers with 1 or more employees (“Covered Employers”), the Act:
 - Provides up to 12 weeks of leave under FMLA for eligible employees who have been employed for at least 30 days and unable to work (or telework) due to a need to care for a son or daughter under 18 years of age when their school or place of care has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19.
 - Creates a federal paid sick leave law providing for employer-paid leave of up to 80 hours to employees for COVID-19 issues.

The CRA does provide for the possibility of regulations that could limit employers to which the expanded FMLA provisions would apply. Such regulations may provide for the possible exclusion of certain health care providers and emergency responders from the definition of eligible employee or an exemption for businesses with under 50 employees if compliance might jeopardize the viability of the business.

The CRA’s provisions mandating group health plan coverage for COVID-19 testing is effective immediately. The FMLA changes and paid sick leave take effect no later than April 2, 2020 and remain in place until the end of 2020.

Below are some important highlights from the final legislation.

Testing

The CRA requires all **employer-sponsored health plans** to provide coverage for testing and other services related to COVID-19 without cost sharing, prior authorization or other medical management requirements. The tests and services include FDA cleared or authorized in vitro COVID-19 diagnostic tests as well as items and services provided to an individual during health care provider office visits, urgent care center visits and emergency room visits that result in ordering or administering an in vitro diagnostic product.

Expanded FMLA

The CRA requires Covered Employers to temporarily expand (April 2, 2020 through December 31, 2020) FMLA protections and benefits to employees who have been employed 30 calendar days and need leave as a result of a school closure or closure of a childcare provider due to the public health emergency related to COVID-19. Employees are not required to meet the usual FMLA requirements, including working for 12 months, working for 1,250 hours or working in a location with at least 50 employees in a 75-mile radius. The final legislation narrowed the available leave and removed leave protections associated with an employee's own exposure or symptoms related to COVID-19 or that of a family member. Note, however, that traditional FMLA remains available, so employees can still take unpaid leave for their own serious health condition or that of a family member.

This new expanded FMLA leave includes both unpaid and employer paid leave. The first 10 days of the COVID-19 FMLA leave are unpaid (this is a change from the proposed legislation which allowed 14 days of unpaid leave). During this period of unpaid leave, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave. After the 10-

day unpaid leave period, Covered Employers must pay employees at two-thirds of the employee's regular rate of pay. The final legislation provides that the amount of such paid leave should not exceed \$200 per day and \$10,000 in the aggregate.

The final legislation includes a special rule that permits Covered Employers of employees who are health care providers or emergency responders to elect to exclude such employees from the application of these requirements.

While the job restoration provisions of FMLA generally apply with respect to this new COVID-19-related leave, there is relief afforded to Covered Employers with fewer than 25 employees. Specifically, such employers need not restore an affected employee to his or her position if the position ceases to exist, though such an employer will be subject to other requirements, including reinstatement to an equivalent position if one becomes available within a one--year period.

Paid Sick Leave

Covered Employers must also provide paid sick leave in connection with COVID-19. The CRA's paid sick leave provisions apply to all employees, even those employed less than 30 days, and apply to all Covered Employers. Under the final legislation, an employer may (but is not required to) exclude employees who are health care providers or emergency responders from the sick leave requirement.

An employee is eligible for paid sick leave under the CRA to the extent that the employee is unable to work (or telework) due to a need for leave because:

- a. the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- b. the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- c. the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- d. the employee is caring for an individual who is subject to an order as described in (a) or has been advised as described in (2).
- e. 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 childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
- f. 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.

Covered Employers are required to provide 80 hours of sick leave to full-time employees, and provide part-time employees with the number of hours averaged over a 2-week period. The sick leave must be provided in addition to the sick leave the Covered Employer already provides.

The amount an employee is paid during this sick leave is based on the employee's required compensation and the employees' number of hours normally scheduled to work

(with a special calculating rule for employees with varying hours). Generally, this means paid sick time is paid at the employee's regular rate of pay (or minimum wage, whichever is greater). However, the final legislation added a special rule permitting employers to use two-thirds of the employee's required compensation with respect to sick leave associated with family members ((d)-(e) above).

Further, the final bill includes a maximum amount of paid leave as follows:

- \$511/day (\$5,110 in the aggregate) for sick leave associated with (a), (b) or (c) above (generally the employee's own care).
- \$200/day (\$2,000 aggregate) for sick leave associated with (d), (e) or (f) above (care for a family member or other designated illness).

The CRA also includes a posted notice requirement related to paid sick leave. A model notice should be made available within 7 days of enactment (by March 23, 2020).

Potential Tax Credits

Beginning on a date to be determined between now and April 2, 2020 and ending on December 31, 2020, the CRA provides refundable payroll tax credits for employers providing paid family leave or paid sick leave wages required under the CRA due to COVID-19. The final rule includes credit for an employer's qualified health plan expenses allocable to wages associated with the respective leaves.

A refundable payroll tax credit is allowed for 100% of wage payments made under expanded FMLA, which, subject to further guidance, may include "qualified health plan expenses" allocable to such wages. However, for each employee, the credit is capped at \$200 per day and \$10,000 in the aggregate (or 50-day total limit).

A refundable payroll tax credit is also allowed for private employers for 100% of payments made for qualified paid sick leave wages, which, subject to further guidance, may include “qualified health plan expenses” allocable to such wages. However, this credit is limited in several ways:

- Wages taken into account are generally capped at \$511 per day per employee.
- Wages taken into account are capped at \$200 per day per employee for employees caring for a family member or for a child whose school or place of care has been closed.
- Only 10 days, in aggregate, may be taken into account.

Employer Action

- **Testing:** all employers should contact their carriers or TPAs to immediately implement coverage of COVID-19 testing with no cost-sharing, no prior authorization requirement, and no medical management requirements. Employers should also evaluate the extent to which plans must cover other items and services furnished in connection with the COVID-19 testing.
- **Expanded FMLA:** Covered Employers should review FMLA documentation and modify to reflect temporary COVID-19 requirements under the CRA. They should consider working with (if not already) an FMLA administration vendor to coordinate compliance with the CRA. Communications should be provided to employees explaining the new FMLA benefits for COVID-19 related leaves. They should also work with their payroll department or vendor to establish procedures for calculating and paying out for paid leave after first 2 weeks.

- **Paid Sick Leave:** Covered Employers should consider working with (if not already) a leave administration vendor to coordinate compliance with the CRA. They should post the DOL model notice (available March 23) and distribute an explanation on eligibility for paid sick leave. They should also work with their payroll department or vendor to establish procedures for calculating and paying out for paid sick leave.
- **Tax Credits:** Covered Employers should work with their payroll department or vendor to track payments under expanded FMLA or paid sick leave and work with them on how to calculate and claim tax credits through payroll tax filings.

We will continue to monitor developments and provide you with updates.