

March 20, 2020

Nathan C. Levy
nlevy@lsfslaw.com
229-854-4399

Phillip A. Sibley
psibley@lsfslaw.com
478-742-8300

Casey B. Foreman
cforeman@lsfslaw.com
229-449-7419

Kelly R. Speir
kspeir@lsfslaw.com
706-728-0896

John D. Blair
jblair@lsfslaw.com
229-854-7141

William R. Merchant
bmerchant@lsfslaw.com
706-442-0505

Austin M. Hammock
ahammock@lsfslaw.com
706-527-0901

Karen J. Gibson
kgibson@lsfslaw.com
478-960-5178

Kent J. Miller
kmiller@lsfslaw.com
770-561-4017

Taylor G. Martin
tmartin@lsfslaw.com
706-570-3000

Spenser L. West
swest@lsfslaw.com
224-828-0816

Of Counsel
R. Napier Murphy
nmurphy@lsfslaw.com
478-742-8300

James M. Elliott, Jr.
jelliott@lsfslaw.com
478-747-3399

OVERVIEW OF “THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT” FOR EMPLOYERS

John David Blair

Litigation, Employment Law, & Workers’ Compensation

Late on March 18, 2020, President Trump signed into law the *Families First Coronavirus Response Act* (the “Act”), which is intended to address several issues and concerns involving the coronavirus/COVID-19 (“COVID-19”). This update is intended to address certain critical aspects of the Act applicable to employers and their insurers by extension.

OVERVIEW:

This Act contains several key provisions applicable to employers that we will cover here: (1) Emergency Paid Sick Leave Under Division E; (2) Mandatory Emergency (Paid & Unpaid) FMLA Leave Under Division C; (3) Emergency Unemployment Assistance Under Division D; and (4) Employer Tax Credits (to offset the impact to employers) Under Division G.

Unfortunately, as is often the case with federal legislation, the Act is nuanced, layered, and peppered with references to other statutes and regulations making it nearly impossible for employers to read and interpret on its face. Also, there are additional and sometimes different regulations for multi-employer organizations involved in collective bargaining agreements not covered by this update.

❖ **Preliminary Matters:**

- The Act’s provisions in this update are effective April 2, 2020 and is set to expire on December 31, 2020.
- Remote work, telecommuting, etc. are considered “working” for purposes of the Act, and for the most part employees who are given this option do not generally qualify as being on leave or requiring leave, and so we believe this *Act strongly incentivizes remote work options for employers.*
- Violations are generally treated and enforced the same way as Fair Labor Standards Act (“FLSA”) minimum wage violations.
- *The Department of Labor will soon be publishing a mandatory poster that must be published by employers* concerning several of the benefits/rights discussed below that are given to employees under the Act.

❖ **Paid Sick Leave Under Division E, the “*Emergency Paid Sick Leave Act*”:**

- Generally: This division provides for mandatory paid sick leave for any employee unable to “work” (including telework, telecommuting, remote work, etc.) **for a qualifying reason**; it is **immediately** available when applicable.
 - Employers are prohibited from requiring an employee to use other paid leave ordinarily or otherwise provided by the employer in question before the employee uses the paid sick time under the Act, meaning this paid leave is in addition to any otherwise provided by the employer.
 - This is immediately available unlike the Family & Medical Leave Expansion Act (discussed below), which has a waiting period before leave is paid.
- Covered Employers: Any person or entity engaged in commerce or in an industry or activity affecting commerce that, in the case of a private entity or individual, employs fewer than 500 employees and in the case of a public agency or any other entity that is not a private entity or individual, employs 1 or more employees.
 - This is deemed to include any person or entity acting directly or indirectly in the interest of an employer (within the meaning of 29 U.S.C. § 203(d)) and any successor of an employer, any public agency as defined by 29 U.S.C. § 203(x), the Government Accountability Office, and the Library of Congress.
 - Possibly non-profits are excluded from this requirement **unless** they engage in an industry or activity affecting commerce.
- Covered Employees: practically all employees, regardless of how long the employee has been employed (distinguishing this benefits from the Emergency FMLA coverage discussed below).
 - ***Employers of “Healthcare Providers” and “Emergency Responders,” however, MAY elect to exclude such employees.***
- Qualifying Reasons:
 1. The employee in question is under a federal, state, or local quarantine or isolation order because of COVID-19;
 2. The employee is advised by a health care provider to self-quarantine because of COVID-19;
 3. The employee has symptoms of COVID-19 and is seeking a medical diagnosis;
 - * (This basically extends the Act’s privileges to those with “*perceived* COVID-10”);
 4. The employee is caring for an individual who meets one of the first two conditions outlined above;
 5. The employee is caring for a son or daughter whose school or child care center is closed because of COVID-19 precautions, or whose child care provider is unavailable for the same reason; OR
 6. 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.

- Calculation of Pay:
 - The U.S. Department of Labor shall be publishing some sort of assistance/guidelines for calculating the proper amount within 15 days from enactment (on March 18, 2020).
 - Leave pursuant to Qualifying Reasons 1, 2, 3, and 6 when taken for the care of the employee in question is generally paid at the greater of: a) the employee's regular rate; b) federal minimum wage; c) state minimum wage; or d) local minimum wage. However, leave pursuant to Qualifying Reasons 4, 5, and 6, when taken for an employee to care for another, are paid at two-thirds (2/3) that rate.
 - Leave pursuant to Qualifying Reasons 1, 2, or 3 above shall be capped at \$511.00 per day and \$5,110.00 in the aggregate.
 - Leave pursuant to Qualifying Reasons 4, 5, and 6 above shall be capped at \$200.00 per day and \$2,000.00 in the aggregate.
- Amount of Paid Leave:
 - Full-time employees are entitled to *up to a maximum of* 80 hours of paid sick leave for a qualifying reason.
 - Part-time employees are entitled to *up to a maximum of* a number of hours that equal the number of hours the employee works on average over a two-week period (initially there were accrued hours in addition to the two weeks of paid sick time and other variations).
 - The foregoing maximum rates are caps only in that that paid leave terminates/ceases beginning on the employee's next scheduled shift "*immediately*" following termination of the qualifying reason/need for the paid sick leave even if the maximum amount of paid leave has not been collected/received.
- Additional Rules & Notes:
 - Unused leave does not "carryover" from year to year, and employers are not required to pay out unused leave upon termination of employment.
 - Employers may NOT ask employees to find someone to cover for/replace them.
 - Wages required to be paid under the emergency sick leave provisions will not be subject to the 6.2 percent social security payroll tax typically paid by employers on employees' wages.
 - The Secretary/Department of Labor is afforded some limited rule-making authority to implement this division of the Act.
- ❖ **Mandatory Emergency (Paid & Unpaid) FMLA Leave Under Division C, the "*Emergency Family and Medical Leave Expansion Act*":**
 - Generally: this division of the Act extends the FMLA on a limited basis to address COVID-19 providing both unpaid and paid lien requirements.
 - Covered Employers: private sector employers with fewer than 500 workers and all governmental entities.

- Covered Employees: employees who have been on the job for at least **30 days** who are unable to work (or to work remotely/telework) for a qualifying reason.
 - As before, an employer of an employee who is a “healthcare provider” or an “emergency responder” **MAY** elect to exclude the employee from the emergency family leave provisions.
- Qualifying Reasons: caring for a minor child if the child’s school or place of care has been closed, or if the child care provider of that child is unavailable due to a COVID-19 emergency.
- Leave Required:
 - Leave ends when the Qualifying Reason for the leave ends or after the usual twelve weeks under the “vanilla” FMLA, whichever occurs first.
 - The first 10 days of leave are unpaid (unless employer chooses to pay), though a workers can opt to use any other leave available from the Employer (presumably including the Act’s paid leave discussed above if the leave is also for the employee).
 - Starting day 11 ongoing, leave must be paid.
- Restoration to Position Post-Leave: generally, the employee on leave must be restored to his/her pre-leave position upon conclusion of the leave; *however*, this requirement does **not** apply to employers with fewer than 25 employees **if** a) the position held by the employee on leave no longer exists due to economic conditions or other changes in the employer’s operating conditions caused by the COVID-19 pandemic, and b) the employer makes reasonable efforts to restore the employee to an equivalent position.
- Calculation of Paid Leave:
 - Starting with the 11th day, workers will receive a benefit from their employers equal to at least two-thirds (2/3) their normal pay rate.
 - However, the paid leave is “capped” at \$200.00 per day and \$10,000.00 in the aggregate.
- Additional Rules & Notes:
 - Employees are required to provide the employer with as much notice as is “practicable” (no definition for this is given).
 - Wages required to be paid under the emergency family leave provisions will not be subject to the 6.2 percent social security payroll tax typically paid by employers on employees’ wages.
 - The Secretary/Department of Labor is authorized to issue regulations to (i) exclude certain health care providers and emergency responders from paid leave benefits, and (ii) exempt small businesses with fewer than 50 employees from the paid leave requirements “*when the imposition of such requirements would jeopardize the viability of the business as a going concern.*”
 - * No clear definition or standards for the emphasized language above is established by the Act.
 - * No process or procedure has been made public as yet for petitioning the Secretary/Department of Labor for a small business exemption.

❖ **Emergency Unemployment Assistance Under Division D, the “*Emergency Unemployment Insurance Stabilization and Access Act of 2020*”:**

- This inner-workings of this division will not likely impact most employers procedurally on a day-to-day basis.
- However, this division does, however, provide for federal grants to state unemployment funds per certain specified terms and conditions.

❖ **Employer Tax Credits (to offset the impact) Under Division G, “*Tax Credits for Paid Sick Leave and Paid Family and Medical Leave*”:**

- Employers will be entitled to refundable credits for the “employer portion” (not the employee portion) of payroll taxes (Old-Age, Survivors, and Disability Insurance (OASDI) (i.e., the 6.2 percent employer portion of the Social Security tax) to cover wages paid under the Act’s sick and family leave divisions/programs.
- The sick leave credit for each employee shall be: (a) for wages (including qualified health plan expenses relative to those wages) of up to \$511.00 per day while the employee is receiving paid sick leave to care for himself or herself; or (b) \$200.00, if caring for a family member or child whose school has closed. The credit shall be limited to 10 days per employee per quarter.
- The family leave credit for each employee shall be: (a) for wages (including qualified health plan expenses relative to those wages) as much as \$200.00 per employee per day; and (b) \$10,000 in the aggregate for all calendar quarters.
- To avoid any “double benefit” or windfall, employers must report the amount of credits received in their gross income.
- Wages taken into account in calculating the credit allowed under the foregoing emergency provisions of the Act reduce the Code §45S paid family and medical leave credit established by the 2017 tax reform act otherwise available to the employers.
- Credits are voluntary, and employers may elect to not take the credit for a given quarter.
- The Department of the Treasury is afforded some limited rule-making authority to implement this division of the Act.
- Railroad Retirement Tax Act (RTA) employment taxes are also eligible for the credit, in the same fashion as for regular social security taxes.

Again, the Act has been passed into law but not fully regulated, implemented, and/or interpreted. New developments may arise over the next several days.