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New Coronavirus Law Temporarily Overhauls Federal Employment Law

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Employers should be advised Congress has passed the first major legislation responding to the evolving novel coronavirus COVID-19 (“COVID-19”) pandemic. On March 18, 2020, a bi-partisan U.S. Senate passed H.R. 6201—the Families First Coronavirus Response Act (“the Act”). President Trump has signed the Act into law. Please note the version of H.R. 6201 the U.S. House initially passed on March 14, 2020 is significantly different from the legislation ultimately signed into law.

In relevant part, the Act fundamentally changes federal employment law by enacting two temporary, emergency statutory schemes: (1) the Emergency Family Medical Leave Expansion Act (“EFMLEA”); and (2) and the Emergency Paid Sick Leave Act (“EPSLA”). Employers should quickly familiarize themselves with the nuances of EFMLEA and EPSLA, which take effect within 15 days of enactment, or **April 2, 2020**, and will remain in effect until December 31, 2020.

I. Emergency Family Medical Leave Expansion Act.

The EFMLEA builds upon the existing Family Medical Leave Act (“FMLA”). As a general matter, the current FMLA requires employers with more than 50 employees to provide eligible employees with up to 12 weeks of unpaid, job-protected leave if they, or an immediate family member, have a serious health condition. Employees are eligible for FMLA leave if they have worked for the employer for at least 12 months.

The EFMLEA significantly expands upon traditional FMLA benefits for employees as follows:

- EFMLEA applies to **all** private employers with fewer than 500 employees, which introduces FMLA concepts to smaller employers for the first time.
- Employers in the health care industry “may elect to exclude” “health care providers” or “emergency responders” from leave provided under EFMLEA.
- Employees are eligible for EFMLEA benefits if they have been employed by their employer for “at least 30 calendar days.”
- The EFMLEA expands FMLA’s current 12-week leave eligibility to also cover employees “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” and the child’s school or childcare provider has been closed due to a public health emergency (“School Age Child Caregiver Leave”). The terms “son or daughter” are subject to FMLA’s expansive definition, which includes a wide array of legal dependants.

- The EFMLEA adds a requirement for employers to at least partially pay eligible employees for up to 12 weeks of leave under the newly added School Age Child Caregiver Leave. The first 10 days of EFMLEA leave may be unpaid, although employees may **voluntarily** choose to use accrued paid time off to cover that initial period. For the remaining period, the employer “shall provide paid leave” in “an amount that is not less than two-thirds of an employee’s regular rate of pay.”
- Critically, EFMLEA places a hard cap on the benefits employees may receive under EFMLEA: “In no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.” That limitation harmonizes an employer’s potential liability under EFMLEA with the payroll tax credit the Act provides to employers.
- The EFMLEA expands FMLA’s job protection requirements to all employers subject to the Act. Under these standards, employers have the same obligation as under traditional FMLA to restore employees who took covered leave to the same or equivalent position when the employees return to work. The EFMLEA creates some narrow exceptions for employers with fewer than 25 employees.

II. Emergency Paid Sick Leave Act.

The Act’s EPSLA provisions change longstanding federal policy to now require employers to provide paid sick leave to certain employees as follows:

- Eligible full-time employees are entitled to up to 80 hours of paid sick leave. Eligible part-time employees are entitled to the number of hours worked, on average, during a two-week period.
- The EPSLA applies to all employers with fewer than 500 employees.
- Employers unilaterally “may elect to exclude” “health care providers” or “emergency responders” from the EPSLA.
- An employee’s entitlement to paid sick leave benefits under EPSLA does not depend on his or her length of employment prior to leave.
- As a general matter, employers must provide paid sick leave to employees who are “unable to work (or telework) due to a need for leave” for any of the following reasons:
 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 who is subject to an order as described in subparagraph (1) or has been advised as described in [sub]paragraph (2).”
 5. “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.”
 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.”
- Employees eligible to receive paid sick leave arising out of the qualifying conditions described in paragraphs (1)-(3), above, are entitled to paid sick leave at their regular rate of pay, but not to exceed “\$511 per day and \$5,110 in the aggregate.” Employees eligible to receive paid sick leave arising out of the qualifying conditions described in paragraphs (4)-(6), above, are entitled to paid sick leave at two-thirds their regular rate of pay, but not to exceed “\$200 per day and \$2,000 in the aggregate.”
- Paid sick leave under EPSLA is available to qualified employees in addition to any paid sick leave

already provided by the employer. Employees may choose to use paid sick leave under EPSLA prior to using the employer's paid sick leave.

- An employee's entitlement to EPSLA paid sick leave terminates upon the cessation of the qualifying conditions listed in paragraphs (1)-(6) above. Employees cannot carryover EPSLA paid sick leave into subsequent years, and employers do not have to pay out EPSLA paid sick leave at termination, resignation, or retirement.
- The EPSLA requires DOL to create a notice for employers to prominently display in the workplace, informing employees of their rights under EPSLA. Employers are required to display that notice.

III. Tax Credits

The Act provides for a tax credit against FICA taxes to reimburse employers for the new paid leave provisions in EFMLEA and EPSLA. We expect significant emergency rulemaking to occur regarding this portion of the Act, which will provide additional details and critical guidance to employers.

IV. Future Rulemaking

The EFMLEA and EPSLA authorize the U.S. Department of Labor ("DOL") to issue regulations exempting employers with fewer than 50 employees if compliance with the new provisions "would jeopardize the viability of the business as a going concern" as well as excluding "certain health care providers and emergency responders." DOL has not issued any such regulations to date, however.

At both the federal and state level, the regulatory response to the COVID-19 pandemic continues to rapidly evolve. Crowley Fleck PLLP recommends employers closely follow all such changes. If you would like more information on these changes, or the Families First Coronavirus Response Act, please contact Crowley Fleck's Employment Practices Group.

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