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THE FEDERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT: EFFECTIVE APRIL 2, 2020

In a previous E-Alert, we discussed passage of the “Families First Coronavirus Response Act” (the “FFCRA” or “Act”) by the U.S. House of Representatives and outlined its key provisions. On Monday, March 16, 2020, the House amended some key provisions of the legislation (discussed below). On Wednesday, March 18, 2020, the U.S. Senate approved it and President Trump signed the FFCRA into law. The Act becomes effective within 15 days.

As amended, the FFCRA includes the following key provisions affecting employers:

1. Expanded Paid Family Leave: From the Act’s effective date and until December 31, 2020, public employees and employees of private employers with less 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.”

a. **Qualifying Leave:** A “Public Health Emergency” means that “the employee is 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 if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable due to [an emergency with respect to COVID-19 declared by a Federal, State, or local authority].”

NOTE: The language noted in the previous E-Alert regarding the need for leave because of the employer’s own diagnosis or quarantine for coronavirus, or to care for a family member in a similar situation, has been removed.

b. **Exclusions:** If an employee is a health care provider or an emergency responder, the employer may elect to exclude such employee from the leave.

c. **Private Employers with Less Than 50 Employees:** The FFCRA expressly applies to private employers with less than 50 employees. However, in a circular fashion, the Act also:

i. Excuses such employers from liability in civil actions by employees for violations of these additional leave requirements. See Section 3104. The small employer could still be subject to a complaint to

the Secretary of Labor and perhaps an action by the Secretary of Labor for injunctive relief, but there will be no monetary liability.

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- ii. Authorizes the Secretary of Labor to issue regulations for good cause that exempt small businesses with less than 50 employees from the leave requirements when the requirements “would jeopardize the viability of the business as a going concern.” It is unclear whether such a regulation will be implemented.
- d. **Paid and Unpaid Leave; Pay Caps:** The first 10 days of leave from work for a Public Health Emergency can be unpaid. If the employee has available paid leave, the employee may elect to substitute available paid leave. Contrary to other forms of FMLA leave, however, the employer cannot require the substitution of paid leave.

After the first 10 days, subsequent leave for a Public Health Emergency (until the 12 weeks of leave is exhausted) is to be paid at a rate of no less than two-thirds of the employee’s regular rate of pay and must be paid for the hours the employee would otherwise be normally scheduled to work—**up to a cap of \$200 per day and no greater than \$10,000 in the aggregate**. Benefits would continue for the entire leave period.

- e. **Application When an Employee is Furloughed or Placed on Unpaid Leave Because of Business Slowdown or Closure:** Based on a literal reading of the Act, if a business puts its employees (or a group of them) on leave because of a decision to temporarily close or slowdown operations, the leave provided would not be for a Public Health Emergency, as defined, and therefore no family leave would be owed. Of course, if the only employees placed on leave were those who would qualify for family leave under the Act, or if that was a factor in the decision, that could create liability for violations of and interference with rights under the Act.
- f. **Job Restoration:** Generally, an employee who takes leave under the Act must be restored to their position; however, there are special circumstances for employers with less than 25 employees.

2. Emergency Paid Sick Leave: Significant changes were also made to the final version of the emergency paid sick leave provision. Under the newly-enacted law:

- a. **Application and Amount:** Public and private employers with less than 500 employees must provide up to 80 hours of emergency paid sick leave to full-time employees and the average number of hours the employee works over a two-week period to part-time employees. This paid leave

benefit is available for immediate use, regardless of how long the employee has been employed by the employer.

- b. **Uses of Emergency Paid Sick Leave:** Emergency paid sick leave may be used for any of the following reasons:
- i. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - ii. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - iii. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - iv. The employee is caring for an individual who is subject to a quarantine order or advised to self-quarantine;
 - v. 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 child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
 - vi. 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.
- c. **Exclusions:** If an employee is a health care provider or an emergency responder, the employer may elect to exclude such employee from emergency paid sick leave.
- d. **Pay Caps:** Generally this emergency paid sick leave is paid at the employee's regular rate of pay; however, the employer can cap pay, and the amount of the cap depends upon the reason for the leave. When leave is used for the reasons identified above in subsections (i), (ii), or (iii), the employer may cap pay at \$511 per day and \$5,110 in the aggregate. When leave is used for the reasons identified above in subsections (iv), (v), or (vi), the employer may cap pay at \$200 per day and \$2,000 in the aggregate.
- e. **Interaction with Other Leave Provided by Employer:** The employer cannot require that other available paid leave be exhausted before this emergency paid sick leave benefit may be used.

The final version of the Act removed the language from the original version stating that this leave is in addition to any other leave provided by the employer. However, because the Act still requires that this leave

be used before any other leave program is exhausted and employers are prohibited from diminishing rights under an existing policy, the best, most logical conclusion is that previously existing sick leave programs cannot be used to satisfy these obligations. This is additional leave.

- f. **Application When an Employee is Furloughed or Placed on Unpaid Leave Because of Business Slowdown or Closure:** The Act defines “paid sick time” as compensated leave provided by an employer for use during an absence from employment for one of the qualified reasons. See Section 5110(5). Therefore, if a business puts its employees on leave because of a decision to temporarily close or slowdown operations, the leave provided would not be for a qualifying reason and no paid sick time would be owed. However, as explained above, the decision regarding which employees go on unpaid leave should be unrelated to eligibility for this leave benefit.
- g. **Other Requirements:** Employers must post the notices of this Act in a conspicuous place, and a model notice will be provided by the Secretary of Labor. No employer may retaliate, discharge, or discipline an employee who takes leave under this Act. These requirements are effective 15 days after enactment of the bill and expire on December 31, 2020.

3. Tax Credits for Emergency Paid Sick Leave and Paid Family Leave: Under the bill, payroll tax credits are provided to employers to later recoup payments made for emergency paid sick leave and paid family leave. The tax credits are allowed against the employer portion of Social Security taxes, with certain caps and limits.

4. Covered COVID-19 Testing at No Cost to Patient: All group and individual health insurance plans must provide coverage for COVID-19 testing, without prior authorization or any cost sharing, deductibles, copayments, or coinsurance from the patient. Testing provided by Medicare and Medicaid will likewise be at no cost to the patient, and increased funding for federal Medicaid and testing of the uninsured also will be provided.

5. Unemployment Insurance: Additional funding is provided to states for processing and paying unemployment insurance benefits.

6. Increased Funding for Food Assistance Programs: Additional funding is provided for food assistance programs, and the work and work training requirements for SNAP benefits are suspended during the crisis.

We will continue to provide updates on these issues as they evolve. In the meantime, if you have any questions related to the legislation or the impact of COVID-19, please reach out to a member of Cline Williams’ Labor and Employment Law Section:



[Susan K. Sapp](#)



[Henry L. Wiedrich](#)



[Tara A. Stingley](#)



[Jason R. Yungtum](#)



[Jill G. Jensen](#)



[Jody N. Duvall](#)



[David R. Buntain](#)



[Lily Amare](#)



[Richard A. Spellman](#)



[Daniel W. Oldenburg](#)



[Renee A. Eveland](#)



[Mary R. Marcum](#)



[Keith T. Peters](#)



[Michelle L. Sitorius](#)



[Katie A. Joseph](#)

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