

March 20, 2020

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

All employers are wading through the myriad of issues that are being raised by the Shelter In Place requirements now in effect for all of California. Employers are finding themselves in difficult situations in determining how to keep business operations running, working with a reduced workforce and paying employees. On Wednesday, March 18, 2020, President Trump signed into law a \$100 billion bill, entitled the *Families First Coronavirus Response Act* (“FFCRA”), in an attempt to provide some relief to employees working for small businesses (less than 500 employees), among other things. The two portions of the Act that are of great import to employees and employers at this moment are the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act.

EXPANSION OF FMLA

Under the FFCRA, the federal Family and Medical Leave Act (“FMLA”) was expanded to apply to all employers with up to five hundred (500) employees (small to mid-size employers). Such employers are required to provide employees who have been on the job for at least thirty (30) days with twelve (12) weeks of leave if there is a “qualifying need related to a public health emergency.” “Qualifying need related to a public health emergency” allows an employee that is unable to work (or telework) due to a need for leave to care for their son or daughter under eighteen (18) years of age if the school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19.¹

Although FMLA is generally unpaid, under the FMLA Expansion Act, paid leave is to be provided by the employer after the first ten (10) days of unpaid leave. During this ten (10)-day “waiting period,” employees may choose to use any accrued paid time-off, including vacation and sick leave. If leave is necessary beyond the initial ten (10)-day period, and the employee continues to have a “qualifying need related to a public health emergency,” the employer is required to pay the employee not less than two-thirds (2/3) of the employee’s regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work. In no event, however, shall the paid leave exceed \$200.00 per day and \$10,000.00 in the aggregate.²

¹ Note that quarantine will not trigger the Emergency FMLA leave provisions, although there may be traditional, unpaid FMLA leave rights available, as well as unemployment insurance.

² The FFCRA authorizes the Secretary of Labor to exclude certain health care providers and emergency responders from providing extended FMLA as well as small businesses with fewer than fifty (50) employees if providing the leave “would jeopardize the viability of the business.” It remains unclear when and how these exclusions will be promulgated.

EMERGENCY PAID SICK LEAVE (“E-PSL”)

Under E-PSL, employers must pay each employee paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

- (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 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 who use leave for their *own illness or quarantine* (reasons (1), (2) or (3)), will have sick leave calculated based on the employee’s regular rate or applicable minimum wage, whichever is greater, but with a limit of \$511 per day and \$5,110 in total. Employees who use their leave for reasons *related to care for others or for school closures* (reasons (4), (5) or (6)), will be paid at two-thirds the employee’s regular rate of pay and in no event shall the paid sick leave exceed \$200 per day and \$2,000 in the aggregate.

Full-time employees shall be entitled to eighty (80) hours of paid sick leave and part-time employees shall receive a number of hours equal to the number of hours that such employee works, on average, over a two (2)-week period. *The entire 80 hours of federal paid sick leave is available immediately.*

Employers cannot require employees to use other paid leave before using E-PSL. Employers with existing sick leave policies (typically 24 hours in CA) must provide E-PSL in addition to the existing leave available.

INTERPLAY OF E-FMLA & E-PLS

In summary, a full-time eligible employee unable to work *due to the closure of a child’s school or*

place of care will be entitled to 80 hours (10 days) of E-PSL and up to 12 weeks of job-protected E-FMLA leave, with the first 10 days paid as E-PSL at their full rate, but not more than \$200 per day and \$2,000 in the aggregate per employee (although the employee can elect to use other CA paid sick leave, pay, vacation, or PTO instead), and the remaining 74 days paid by the employer at two-thirds of their regular pay up to a maximum entitlement of \$200 per day and \$10,000 in the aggregate per employee, all for a total leave payout of no more than \$12,000 per employee.

Meanwhile, eligible full-time employees *unable to work due to quarantine/COVID-19 sickness* will be entitled to receive 80 hours (10 days) of E-PSL paid by the employer at the full regular rate up to a maximum entitlement of \$511 per day and \$5,110 in the aggregate per employee (although the employee can elect to use other CA paid sick pay, vacation, or PTO instead).

TAX CREDIT

Employers are entitled to receive a payroll tax credit for up to 100% of the paid sick leave paid out by the employer under the FFCRA, subject to caps based on the reason for the leave and both daily and quarterly maximums.

Attached is a diagram summarizing the new Acts and (hopefully) simplifying the interplay and impacts on small to mid-size employers and their workforce. If you have any questions or would like any further clarification on the FFCRA and its impacts, please feel free to reach out to us.