

Employment Law Alert: “Families First Coronavirus Response Act”

On March 18, 2020, the President signed into law H.R. 6201, entitled the “Families First Coronavirus Response Act” (FFCRA). The FFCRA contains eight broad “Divisions”:

- A. Second Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020
- B. Nutrition Waivers
- C. Emergency Family and Medical Leave Expansion Act
- D. Emergency Unemployment Insurance Stabilization and Access Act of 2020¹
- E. Emergency Paid Sick Leave Act
- F. Health Provisions
- G. Tax Credits for Paid Sick and Paid Family and Medical Leave
- H. Budgetary Effects.

This Bulletin will outline key provisions of Divisions C, D, E and G, which have the most immediate implications for employers and employees.

Division C – Emergency Family and Medical Leave Expansion Act (EFMLEA).

- **Amends the federal FMLA;** expires 12/31/2020
- **Definitions/Coverage:**
 - “Eligible employee”: employed for at least 30 calendar days by the employer from whom leave is requested
 - Employer threshold: fewer than 500 employees, no duration requirement
 - “Qualifying Need Related to Public Health Emergency”: employee unable to work (or telework) due to need to care for employee’s son or daughter under age of 18 if the school or place of care has been closed or child care provider is unavailable due to a public health emergency
 - “Public Health Emergency”: emergency related to COVID-19 declared by Federal, State or local authority
 - “Child Care Provider”: provider who receives compensation for providing child care services on a regular basis
 - “School”: elementary or secondary school
- **Regulatory Authority:** Secretary of Labor authorized to issue regulations for good cause to
 - Exclude certain health care providers and emergency responders from “eligible employee”
 - Exempt small businesses with fewer than 50 employees when the imposition of requirements would jeopardize the business as a going concern
- **Initial Unpaid Leave:** First 10 days of leave may be unpaid; employee may elect to use accrued PTO (all kinds)

¹ The Vermont Department of Labor has posted some guidance for employers at <https://labor.vermont.gov/covid19>

- **Paid Leave:** Employer must provide paid leave after initial 10 days
 - in amount not less than 2/3 employee's regular rate of pay
 - based on
 - number of hours the employee would otherwise be normally scheduled to work, or,
 - if no normal schedule, average hours per day over 6 month period prior to leave, including hours for which employee took leave of any type, or
 - if employee did not work over such period, the reasonable expectation at the time of hiring
 - not to exceed \$200/day or \$10,000 in the aggregate
- **Notice:** Employee shall provide such notice as is practicable
- **Restoration to Position** requirements do not apply to employer with fewer than 25 employees if
 - Position at time leave commenced no longer exists due to economic or operational conditions that affect employment and are caused by public health emergency during the period of leave
 - Employer makes reasonable efforts to restore the employee to an equivalent position, and contact employee if equivalent position becomes available during a period of 1 year from the earlier of
 - date that the qualifying need concludes, or
 - date that is 12 weeks after the leave commences
- **Employers under multi-employer CBAs** may fulfill obligations under the FFCRA by making contributions to a fund, plan or program that enables employees to secure pay for FFCRA leave, and covered employees may secure pay from such fund, plan or program
- **Health Care Providers:** may elect to exclude employee from coverage

Division D – Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISA)

- **Amends Social Security Act;** Provides for emergency grants in FY 2020 and transfers to State accounts in UI Trust Fund, to be administered by States under their UI laws
- **Requirements for State:**
 - must require employers to provide notification to employees of the availability of UI compensation at the time of separation
 - must ensure that applications for UI and assistance with process are accessible in at least 2 of the following: in-person, phone, online
 - must notify applicants when application is received and provide information to ensure successful processing
 - must demonstrate steps to ease eligibility and access, including waiving work search requirements and waiting week, and non-charging employers directly impacted by COVID-19 due to illness in the workplace or direction from public health official to isolate or quarantine workers
- **Regulatory authority to Secretary of Labor**

Division E—Emergency Paid Sick Leave Act (EPSLA)

- **Coverage/entitlement:** Requires covered employers to provide Paid Sick Time (PST) to all employees, regardless of tenure, to the extent employee is unable to work (or telework) because Employee:
 - Is subject to Federal, State, or local quarantine or isolation order related to COVID-19
 - Has been advised by health care provider to self-quarantine due to concerns related to COVID-19
 - Is experiencing symptoms of COVID-19 and seeking medical diagnosis
 - Is caring for an individual subject to a Federal, State or local quarantine or isolation order related to COVID-19 or has been advised by a health-care provider to self-quarantine
 - Is caring for son or daughter if school or place of care has been closed, or child care provider is unavailable, due to COVID-19 precautions
 - Is experiencing any other substantially similar condition specified by Secretary of HHS in consultation with Treasury and DOL
- **Exclusion for health care providers.** Employers of health care provider employees may elect to exclude them
- **Caps:**
 - Not to exceed \$511/day and \$5,110 in aggregate for COVID-19 quarantine, isolation or symptoms
 - Not to exceed \$200/day and \$2,000 in aggregate for caregiving or substantially similar condition
- **Duration:**
 - FTE: 80 hours
 - PTE: average hours over a 2-week period
- **Termination of PST:** next scheduled workshift following the termination of need for PST
- **Carry over:** No carry over from one year to the next
- **Prohibition:** Employer may not require employee to
 - search for or find a replacement
 - use other paid leave before using PTS
- **Employment Practices:** Employer may not discriminate or retaliate against an employee who
 - Takes PST leave
 - Files a complaint or institutes or provides testimony in any proceeding related to this Act
- **Notice:** Employer must post notice in a form to be approved by DOL; model notice to be provided within 7 days of enactment
- **Enforcement:** Employer who fails to provide PST under EPSLA, or willfully terminates an employee in violation of EPSLA, shall be considered to have violated the minimum wage and employment practices provisions of FLSA and subject to penalties under FLSA §§ 16 and 17
- **Regulatory Authority** to DOL
- **Employers under multi-employer CBAs** may fulfill obligations under the FFCRA by making contributions to a fund, plan or program that enables employees to secure pay for FFCRA leave, and covered employees may secure pay from such fund, plan or program
- **Health Care Providers:** may elect to exclude employee from coverage

- **Employers with less than 50 employees** may apply to the Department of Labor for exemption from the paid sick leave requirement if compliance would jeopardize the viability of the business as a going concern.

Division G – Tax Credits for Paid Sick and Paid Family and Medical Leave

- Employer credit against Payroll Tax in the amount of 100% of qualified sick leave wages or family leave wages paid each quarter
 - Subject to caps
 - Excess treated as overpayment and refunded
 - Allowance of credit for certain health plan expenses allocable to qualified sick leave wages
 - Credit against self-employment tax for eligible self-employed individuals
- Wages paid under EPSLA and EFMLA shall not be considered wages under IRC §3111(a) or compensation under IRC §3221(a)

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