What does the Families First Coronavirus Response Act mean for employers?

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By Madison Greenland, Esq., Philip Miles, Esq., and Ethan Wilt, Esq.

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) into law. This whitepaper will address several important changes to employment law in the FFCRA:

- Emergency Family and Medical Leave Expansion Act
- Emergency Paid Sick Leave Act
- Tax Credits for Paid Sick and Paid Family and Medical Leave

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act ("EFMLA") provides additional leeway, beyond that provided by the Family Medical Leave Act of 1993 (29 U.S.C. 2611, et seq.) ("FMLA"), for certain employees who need to take an extended leave of absence from their employment as a result of COVID-19. This act becomes effective no later than fifteen (15) days from the time that it is enacted into law (April 2, 2020) and ends on December 31, 2020. However, the EFMLA applies only to employers with fewer than 500 employees, allowing some of the nation's largest employers to escape the EFMLA's requirements.

Under the EFMLA, employees may be eligible for up to 12 weeks of leave for a "qualifying need related to a public health emergency," which in this case, refers to the COVID-19 pandemic. In order to be eligible for this leave period, the employee must have been employed for at least 30 calendar days prior to requesting leave. Further, the EFMLA clarifies that a "qualifying need" for leave is leave only to care for a child under the age of 18 as a result of school, place of care, or childcare closings in the wake of COVID-19 mitigation efforts and/or mandates. When taking leave as a result of a "qualifying need," the employee must only give the employer as much notice "as is practicable."

The EFMLA also speaks to paid and unpaid leave. It states that the initial ten (10) day period of any leave may be unpaid; however, an employee can elect to substitute

accrued vacation, personal, or medical/sick leave for this unpaid time. After the initial ten (10) day period, though, an employer is required to pay the employee not less than two-thirds of the employee's regular rate of pay, or for the number of hours the employee would have been otherwise expected to work. The amount of required pay, however, cannot exceed $200 per day, nor can it exceed $10,000, in the aggregate.

While the FMLA has generally required that employers restore employees who take qualified leave to their prior positions, the EFMLA makes some exceptions to this requirement. Employers with fewer than 25 employees are not required to restore employees who take leave under the EFMLA to their prior positions if the positions held by the employees do not exist due to economic conditions, or other changes in operating conditions, as a result of COVID-19. However, these employers must still make reasonable efforts to restore the employee to an equivalent position following any leave period.

Finally, certain employees, even those who would otherwise seem to qualify for leave based on the above, may not be eligible for leave under the EFMLA. The EFMLA specifies that health care providers and emergency responders can be excluded from the application of the EFMLA's provisions. Further, certain small businesses, i.e., those with fewer than 50 employees, may be exempt from the EFMLA's requirements when the requirements would otherwise jeopardize the viability of the business.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (the "EPSLA") requires employers with fewer than 500 employees to provide paid sick leave to employees who are unable to work or telework 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 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 due to concerns related to COVID-19;

5. The employee is caring for his or her son or daughter because the school or place of care of the employee's son or daughter has been closed or is unavailable due to COVID-19 precaution; 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.

Full time employees are entitled to two weeks (80 hours) of paid sick leave. Part-time employees are entitled to a number of hours equal to the number of hours that they work, on average, over a two-week period.

Employees taking paid sick leave under the EPSLA must be paid the greater of their regular rate of pay or the applicable minimum wage rate. An exception exists if the employee is taking EPSLA paid sick leave because of items (4), (5), or (6), above. If so, the employee's required paid sick leave is two-thirds of the greater of the employee's regular rate of pay or the applicable minimum wage rate. The EPSLA caps paid sick leave at $511 per day and $5,110 in total for paid sick leave taken on the basis of items 1, 2, or 3, above. If paid sick leave is taken on the basis of items 4, 5, or 6, it is capped at $200 per day and $2,000 in total.

If an employer has a part-time employee whose schedule varies from week to week such that the employer cannot determine the number of hours that the employee would have worked had he or she not taken EPSLA paid sick leave, the employer is required to provide the employee with paid sick leave equal to the average number of hours that the employee was scheduled per day over the six month period ending on the date on which the employee took the EPSLA paid sick leave. This calculation includes hours for which the employee took any type of leave. If the part-time employee did not work over the six month period, the employer should use the average number of hours that the employee reasonably expected to work per day at the time of the employee's hiring.

EPSLA paid sick leave does not carry over from one year to the next. It stops at the start of the employee's next scheduled workshift that immediately follows the end of the employee's need for paid sick leave (identified in items 1-5, above).

The paid sick leave granted by the EPSLA is automatically available to employees. They may use it immediately, regardless of how long they have been employed by the employer. Moreover, employees can use the EPSLA-granted paid sick leave before other leave provided by their employer. In other words, the employer cannot require an employee to use other paid leave provided by the employer before using the EPSLA-granted paid sick leave.

The ESPLA-granted paid sick leave is in addition to an employer's existing leave policies. Consequently, employers cannot change their paid leave to avoid the EPSLA's scheme. Equally important, employers cannot require any employee using EPSLA-granted paid sick leave to search for or find a replacement to cover the hours that the employee will be on leave.

Employers cannot fire, discipline, or discriminate against an employee who takes paid sick leave under the EPSLA and files a complaint or commenced proceedings under the EPSLA.

Employers are required to conspicuously post, and keep posted, on places on the premises where notices to employees are customarily posted, a notice that will be prepared and approved by the Secretary of Labor in the upcoming days.

The EPSLA will take effect within 15 days after enactment of the FFCRA. It will expire on December 31, 2020. Within 15 days of the FFCRA's enactment, the Secretary of Labor will issue guidelines to assist employers in calculating the amount of paid sick leave under the EPSLA. In addition, the Secretary of Labor may: (1) exclude certain health care providers and emergency responders; (2) exempt small businesses with fewer than fifty employees when the EPSLA's requirements would threaten such businesses' viability; and (3) ensure consistency with other parts of the FFCRA.

Tax Credits for Paid Sick Leave and Paid Family and Medical Leave

The FFCRA also provides a series of refundable tax credits. The intent behind the tax credits is to offset the burden of paying qualified paid sick leave that has been placed on employers as a result of the FFCRA. The following is a breakdown of the main tax credits available under the FFCRA. Although not discussed here, the FFCRA also provides tax credits for certain eligible self-employed individuals.

Tax Credit for Paid Sick Leave under the Emergency Paid Sick Leave Act

The FFCRA provides a refundable tax credit equal to 100% of qualified sick leave wages that are paid by an employer for each calendar quarter. This tax credit is allowed against the tax that is imposed by the employer portion of Social Security taxes under section 3111(a) or 3221(a) of the Internal Revenue Code of 1986.

The FFCRA places certain limitations on the tax credit. First, the amount of qualified sick leave wages is capped at $200/day ($511/day when the ground for the employee taking paid leave is for item 1, 2, or 3, as discussed in the EPSLA section, above). Second, the total number of days that an employer can account for per employee for any calendar year is capped at ten days.

If the tax credit exceeds the employer's total liability under section 3111(a) or 3221(a) of the Internal Revenue Code for all employees for any calendar quarter, the excess credit goes to the employer. This is akin to the refund an employer receives if it overpays its portion of the federal withholding taxes for social security and Medicare.

An employer may elect to not have the credit apply. The FFCRA contains specific rules to prevent employers from receiving a double benefit.

Tax Credit for Paid Family and Medical Leave

The FFCRA provides a refundable tax credit equal to 100% of the qualified family leave wages paid by an employer for each calendar quarter. This tax credit is similar in many ways to the tax credit discussed above. The most significant differences between the two are: (1) the cap on the amount of wages that may be taken into account for an employee with respect to determining the amount of credit is capped at $200 per day and $10,000.00 for all calendar quarters; and (2) there is no ten day cap in place.

We're Ready to Help

McQuaide Blasko is tracking coronavirus-related developments in the law, and we are ready to help. McQaide Blasko fully equipped to handle video conferencing and online document collaboration. We understand that many people are looking for ways to reduce in-person contact, and we stand ready to provide legal services remotely as needed. Contact us at 814.235.2222 or via email at contact@mqblaw.com.

About the Authors

The authors are all attorneys in McQuaide Blasko's Labor & Employment Law Practice Group, providing representation in compliance, consulting, and litigation throughout the central Pennsylvania region. McQuaide Blasko has offices in State College, Hollidaysburg, Hershey, and Williamsport. Philip Miles also authors an employment law blog, Lawffice Space.

Madison Greenland
View Profile

Philip Miles
View Profile

Ethan Wilt
View Profile