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**MEMORANDUM**

**DATE:** March 20, 2020

**RE:** Families First Coronavirus Response Act

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On March 18, 2020, Congress passed, and the President signed into law, the Families First Coronavirus Response Act ("FFCRA"). The FFCRA includes multiple subsections. Those sections most relevant to our employers are summarized in FAQ-form below.

**Division C – Emergency Family and Medical Leave Expansion Act**

**What employers must provide leave under the Emergency Family and Medical Leave Expansion Act ("FMLEA") for their employees?**

Public and private employers who employ 500 or fewer employees.

**Who is eligible for leave under the FMLEA?**

An eligible employee is an employee who has been employed for at least 30 calendar days. The employee must have a qualifying need related to a public health emergency, meaning the employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the school or place of care has been closed, or the childcare provider is unavailable due to a public health emergency.

A public health emergency is an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

**Is leave under the FMLEA paid or unpaid?**

The first 10 days of leave under the FMLEA may consist of unpaid leave; however, the employee may elect to substitute any accrued vacation leave, personal leave, or medical

or sick leave for unpaid leave. Employers may not require employees to substitute any accrued leave.

After 10 days, the employer shall provide paid leave for each day of leave under FMLEA.

### **How much is the paid leave?**

The paid leave must be at least two-thirds of an employee's regular rate of pay or \$200 per day, whichever is lesser. The number of hours paid is based on how many hours the employee would normally be scheduled to work.

For employees with varying schedules, the employer must average the number of hours the employee was scheduled to work per day over the 6-month period ending when the employee takes such leave.

In no event shall such paid leave exceed \$10,000 in the aggregate.

### **Are employees restored to their original positions after the leave period?**

The Family and Medical Leave Act's "restoration to position" provisions are still in effect; however, shall not apply with respect to an employer who employs fewer than 25 employees if the following conditions are met:

1. The employee takes leave under the FMLEA because of a qualifying need related to a public health emergency;
2. The position held by the employee when the leave commenced no longer exists due to economic conditions or other changes in operating conditions of the employer:
  1. That affect employment; and
  2. Are caused by a public health emergency during the period of leave;
3. The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with the same benefits, pay, and other terms and conditions of employment; and
4. If the reasonable efforts fail, the employer makes reasonable efforts for a one-year period to contact the employee if an equivalent position becomes available.

### **Who is excluded from the FMLEA?**

An employer who employs healthcare providers or emergency responders may elect to exclude such employees from the applications of the FMLEA.

The U.S. Department of Labor has the authority to exempt small businesses with fewer than 50 employees from the requirements of the Act if complying with such requirements would jeopardize the viability of the business as a going concern.

## **What about Employers under a multiemployer collective bargaining agreement (“CBA”)?**

An employer signatory to a multiemployer CBA may fulfill its obligations under the paid leave provisions of the FMLEA by making contributions to a multiemployer fund, plan, or program based on the paid leave each of its employees are entitled to. Provided, however, the fund, plan, or program must enable employees to secure payment from such fund, plan or program based on hours they have worked under the multiemployer CBA for leave taken under FMLEA because of a qualifying need related to a public health emergency

## **When do I need to provide leave?**

The FMLEA shall be effective no later than 15 days after the date of enactment (i.e., April 2<sup>nd</sup>) and will expire on December 31, 2020.

## **Division E – Emergency Paid Sick Leave Act**

### **When must an employer provide paid sick time under the Emergency Paid Sick Leave Act?**

An employer is required to provide each employee with paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- Is caring for an individual who is subject to an isolation order or has been advised to self-quarantine by a health care provider;
- Is caring for his or her child if the child's school or place of care has been closed (or the childcare provider is unavailable) due to COVID-19 precautions; or
- 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.

### **How many hours of paid sick time is an employee entitled?**

Full-time employees are entitled to 80 hours of paid sick leave while part-time employees are entitled to a number of hours equal to the number of hours that such employee works, on average, over a two-week period. Any unused sick time will not carry over from one year to the next.

## **How is paid sick time calculated?**

Paid sick time is calculated based on the employee's required compensation (which cannot be less than the greater of the employee's regular rate of pay or the current minimum wage) and the number of hours the employee would otherwise be normally scheduled to work.

If a part-time employee's schedule varies from week-to-week to such an extent that an employer is unable to determine with certainty the number of hours the employee on leave would have worked, the employer must use the employee's average daily hours calculated by using a six-month period ending on the date the employee takes paid sick time (including hours for which the employee took leave of any type). If the employee did not work over such a period, the number must be the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

## **Is there a limit on the amount of paid sick time an employer is required to pay?**

The limit on the amount paid for sick time depends on why the employee is using the paid sick time. If an employee is absent from work because of an isolation order, recommended self-quarantine, or to seek a medical diagnosis following symptoms of COVID-19, the maximum amount an employer is required to pay is \$511 per day and \$5,110 total.

If the employee is absent from work for one of the three other reasons noted above (i.e., to care for another, to care for a child following a school or daycare closure, or a condition specified by one of the Secretaries), the maximum required payment is \$200 per day and \$2,000 total.

## **Who is eligible for Paid Sick Leave?**

All employees covered under this Act are eligible for paid sick leave, regardless of how long the employee has been employed.

## **Does an employer have to provide notice of the availability of paid sick time?**

Employers are required to post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements under the Act.

The Secretary of Labor will make a model notice available no later than seven days after the date of enactment (i.e. March 25<sup>th</sup>).

## **What are some things an employer cannot do under the Act?**

It is unlawful for any employer to discharge, discipline, or in any other manner discriminate or retaliate against any employee who exercises rights under the Act.

Additionally, an employer cannot require an employee that is provided leave to find another employee to cover the employee's hours while the employee is out, nor may an employer require an employee to use other paid leave provided by the employer before the employee uses paid sick time under this Act.

## **What about employers under a multiemployer CBA?**

An employer signatory to a multiemployer CBA may, consistent with its bargaining obligations and its CBA, fulfill its obligations under the Act by making contributions to a multiemployer fund, plan, or program based on the hours of paid sick time each of its employees are entitled to under the Act while working under the CBA. Provided, however, that the fund, plan, or program enables employees to secure payment from such fund, plan, or program based on hours they have worked under the CBA and for the uses specified in the Act (i.e., the uses described above related to COVID-19).

## **When will the Emergency Paid Sick Leave Act take effect and for how long will it be effective?**

The Emergency Paid Sick Leave Act shall be effective no later than 15 days after the date of enactment (i.e. April 2<sup>nd</sup>) and will expire on December 31, 2020.

## **Division G - Tax Credits for Paid Sick and Paid Family and Medical Leave**

### **What kind of credits are available to employers?**

Under the Act, an employer may take a credit against its payroll tax for each calendar quarter for the qualified sick leave wages paid and/or qualified family leave wages paid.

### **What are "qualified sick leave wages?"**

Wages and compensation paid by an employer which are required to be paid under the Emergency Paid Sick Leave Act discussed in the summary of Division E above.

### **How much is the credit for qualified sick leave wages?**

This credit is an amount equal to 100% of the qualified sick leave wages paid by the employer with respect to the calendar quarter in which such wages were paid.

The credit cannot exceed the payroll tax on the wages paid with respect to the employment of all employees of the employer during the relevant calendar quarter. Additionally, the amount of qualified sick leave wages taken into account shall not exceed

\$511 or \$200 (depending on why leave was taken under the Emergency Paid Sick Leave Act) for any day (or portion thereof) for which the individual is paid qualified sick leave wages.

### **What are "qualified family leave wages?"**

"Qualified family leave wages" means wages and compensation paid by an employer which are required under the FMLEA discussed in the summary of Division C above.

### **How much is the credit for qualified family leave wages?**

This credit is an amount equal to 100% of the qualified family leave wages paid by the employer with respect to the calendar quarter in which such wages were paid.

The amount of qualified family leave wages taken into account shall not exceed, for any day (or portion thereof) for which the individual is paid qualified family leave wages, \$200 and, in total with respect to all calendar quarters, \$10,000.

### **Can the credit be increased for health plan expenses?**

The amount of each credit is increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified sick leave wages for which such credit is allowed.

"Qualified health plan expenses" means amounts paid or incurred by the employer to provide and maintain a group health plan, but only to the extent that such amounts are excluded from the employee's gross income under the Internal Revenue Code.

### **How do these credits affect an employer's gross income?**

The gross income of the employer, for the taxable year, increases by the amount of such credit(s). Any wages taken into account in determining the credit shall not be taken into account for purposes of determining the credit allowed under Section 45S of the Internal Revenue Code (employer credit for paid family and medical leave).

### **To which wages does this section of the Act apply?**

This section will only apply to wages paid with respect to the period beginning on a date selected by the Secretary of the Treasury which is during the 15-day period beginning on the date of the enactment of the Act and ending on December 31, 2020.

### **Are any of the wages required to be paid under the Emergency Paid Sick Leave Act or FMLEA considered "wages" or "compensation" under the Internal Revenue Code?**

These payments shall not be considered wages or compensation for purposes of the payroll tax.