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Memorandum

UPDATE: The Families First Coronavirus Response Act: New Sick Leave and Child-Care Leave Laws

March 19, 2020 (Revised April 3, 2020)

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act ("FFCRA") into law. The overwhelmingly bipartisan legislation passed the Senate earlier that day on a vote of 90-8. The House of Representatives passed the legislation on a vote of 363-40 on March 14. On March 16, 2020, the House approved a technical corrections package which made a number of substantive changes to the sick and child-care leave provisions in the earlier legislation. The multi-billion dollar law aims to temper the financial impact of the coronavirus disease 2019 ("COVID-19") on states, territories, the uninsured, the unemployed, workers, and individuals who rely on food assistance, such as children and low-income seniors. To ensure swift passage, the law did not include more contentious measures, such as tax cuts or plans to assist specific types of affected industries.

On April 1, 2020, the Department of Labor ("DOL") issued new regulations to implement COVID-19-related paid sick and family leave benefits under the FFCRA, effective immediately (the "Regulations"). The Regulations provide the most comprehensive guidelines to date on who qualifies for COVID-19-related leave since the passage of the FFCRA.

Lawmakers have committed to continue providing immediate and significant assistance as the pandemic progresses, including a broader economic stimulus package which to date has taken shape as the Coronavirus Aid, Relief, and Economic Security Act (or the "CARES Act"), signed into law on March 27, 2020. For more information on the CARES Act, please see our memorandum here.

Emergency Sick Leave and Expanded FMLA Child-Care Leave

Two of the most significant provisions of the law address (1) two-week emergency paid leave for COVID-19 related quarantines and sickness (and unavailability of child-care providers) and (2) paid Family and Medical Leave Act ("FMLA") leave for care of children whose school is closed or whose child care provider is unavailable for COVID-19 related reasons. Both of these mandates apply only to employers with *fewer than* 500 employees,[1] became effective April 1, 2020, and expire December 31, 2020. However, the DOL will not bring enforcement actions based on FFCRA violations occurring through April 17, 2020, provided that employers have made reasonable, good faith efforts to the comply with the law.

[1] The law does not apply to employers with 500 or more employees presumably based on the belief that most larger employers already have robust paid-time off/sick leave policies.

Emergency Sick and Care-Giver Leave. The two-week emergency sick leave provisions (the "Emergency Paid Sick Leave Act") require that covered employers provide all of their employees[2] with two weeks of paid sick leave to the extent that the employees are unable to work (or telework) because of a need to take leave for the following reasons:

- The employee is subject to a government quarantine or isolation order related to COVID-19 or the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (or the employee is caring for an individual under such an order or advice).
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for their son or daughter if the school or place of care of their son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
- 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.

For an employee who is quarantining or seeking a diagnosis, the sick leave pay rate is at the employee's full regular rate (e.g., a full time employee would be paid full pay, and a 20-hour-per-week part-time employee would be paid for 20 hours per week of sick leave), and capped at $511 per day and $5,110 total. For an employee who is caring for another person under quarantine or caring for a son or daughter (or needs leave because of a "substantially similar condition"), the sick leave pay rate is reduced to two-thirds of the employee's regular rate of pay, and capped at $200 per day and $2,000 total.

The employees may choose how to sequence their use of available paid leave, and cannot be required to use other available paid leave before using emergency sick leave. Employers may exclude employees who are health care providers or emergency responders from taking this leave. In addition, the DOL authorized an exemption for small businesses with fewer than 50 employees from the child-care related provisions when the imposition of such requirements would jeopardize the viability of the business as a going concern (see additional discussion below).

Expanded Leave Under FMLA. The separate FMLA amendments (the "Emergency Family and Medical Leave Expansion Act") operate independently of the two-week emergency paid sick leave rule. These amendments provide for partial pay during leave but only apply for employees who need to miss work to care for a son or

[2] The Regulations include an exception that employers may exclude employees who are "health care providers" or emergency responders from taking paid leave. For purposes of the exclusion from paid leave requirements (but not other purposes of under the FFCRA), the term "health care provider" is defined broadly to include not only diagnosing medical professionals, but also other workers, including employees of contractors, who are needed to keep hospitals and similar health care facilities well supplied and operational. This can include workers who are employed (in whatever capacity) by entities which provide care or healthcare instruction or education, as well as workers involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency.

daughter (as defined by the Regulations)[3] whose school is closed, or whose care provider is unavailable, because of COVID-19 related reasons. This rule also only protects employees who have been employed with a covered employer for at least 30 calendar days before commencing leave. For purposes of COVID-19-related FMLA leave, eligibility extends to employees who were laid off by an employer on or after March 1, 2020 and later rehired by the employer, if they had worked for that employer for at least 30 of the last 60 calendar days prior to the employee's layoff.

Under these provisions, a qualifying employer must pay eligible employees at two-thirds of the employee's regular rate for weeks three through week twelve of their FMLA leave (the first two weeks of FMLA leave remain unpaid, but this period overlaps with the two weeks of mandated emergency paid sick leave, and employees may use any other available paid leave during this time). The paid FMLA leave is capped at $200 per day and $10,000 total.

The standard for using this FMLA leave is much more limited than the emergency sick leave test, with eligible employees entitled to take leave only if they are unable to work (or telework) due to a need for leave to care for a son or daughter whose school is closed, or whose care provider is unavailable, because of COVID-19 related reasons. An employee with an actual illness related to COVID-19 cannot make an independent claim for paid FMLA leave; this employee would be limited to the two-week emergency leave. An employee who receives the two-week emergency leave for childcare reasons and subsequently becomes ill related to COVID-19) would not be able to take paid emergency leave again. This employee would need to look to other paid leave that may be available under the employer's policies or state law. As with emergency sick leave, employees who are health care providers or emergency responders may not be eligible for leave.

Tax Credits. The measure also provides payroll tax credits to employers to cover wages paid to employees while they are taking time off under the law's sick leave and family leave programs ("Qualified Leave Wages"), and for certain related qualified health plan expenses, subject to the caps and limitations set forth above. Similar credits are provided to certain self-employed individuals. On March 31, 2020, the IRS issued guidance clarifying that (i) employers eligible for tax credits under the FFCRA may retain both (a) withheld federal income tax and (b) Social Security and Medicare taxes (both the employee and employer shares) rather than paying them in and waiting for a refund; and (ii) if the federal employment taxes set aside for deposit are insufficient to cover the employer's obligation to provide Qualified Leave Wages, eligible employers would then file Form 7200 for advance payment of refundable tax credits. In addition, the IRS guidance makes clear that no "double benefit" is allowed with respect to using the same wages for the purpose of earning multiple tax credits under the FFCRA and the CARES Act.

Other State Sick Leaves. We note that some states have adopted or are considering separate mandated sick leave programs. For more information on New York state's sick leave actions, please see our memorandum here.

[3] The Regulations define "son or daughter" expressly to include those who are under age 18 or are 18 years of age or older and incapable of self-care because of a mental or physical disability.

Implementing Regulations from the DOL. On April 1, 2020, the DOL issued the Regulations, which are effective immediately (and will be codified at 29 CFR Part 826). Notably, the Regulations provide the following (among other) clarifications:

- *All Current Employees in the U.S. Are Counted*. To determine if an employer has fewer than 500 employees, the employer must count all full-time and part-time employees employed within the United States (including in any territory or possession of the U.S.) at the time an employee would take leave. This includes: (i) all current employees, regardless of length of service; (ii) employees on leave of any kind; (iii) temporary employees supplied by temporary placement agency who are jointly employed under the Fair Labor Standards Act ("FLSA") by the employer and another employer; and (iv) day laborers supplied by temporary placement agency. Employers are not required to count individuals who are independent contractors under the FLSA, or workers who have been laid off and not subsequently reemployed.
- *All Common Employees of Joint Employers or All Employees of Integrated Employers Are Counted Together*. Typically, a corporation (including its separate establishments or divisions) is considered a single employer and all of its employees must be counted together. Where one corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees (in which case all jointly employed individuals are counted together). In general, two or more entities are separate employers unless they meet the integrated employer test under the FMLA. If two entities are an integrated employer under this test, then employees of all entities making up the integrated employer must be counted.
- *Unlicensed/Uncompensated Child Care Providers May Qualify*. For purposes of the child-care-related provisions of the FFCRA, an unavailable child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee's child.
- *Ability to Telework Defined*. An employee is able to telework if: (i) his or her employer has work for the employee; (ii) the employer permits the employee to work from the employee's location; and (iii) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work.
- *FLSA "Workday" Rules Suspended for COVID-19-Related Telework*. Telework may be performed during normal hours or at other times agreed by the employer and employee. Consistent with the FLSA, non-exempt employees who are teleworking for COVID-19 related reasons must be compensated for all hours actually worked and which the employer knew or should have known were worked by the employee (this includes video-chatting and responding to emails etc.). However, the DOL expressly provided in the Regulations that the FLSA's typical requirements for when a workday begins and ends—and therefore which hours must be included in the computation of hours worked—do not apply to employees while they are teleworking for COVID-19 related reasons.

- *"But For" Causation Required*. To be eligible for emergency paid sick leave or expanded FMLA leave, the COVID-19-related circumstances must be *the reason* for the employee's inability to work or telework, not just a contributing factor.
- *Paid Leave Not Available if No Work is Available*. An employee may not take paid FFCRA leave where the employer does not have work for the employee, as a result of a shutdown order or other circumstances. This rule would prevent an employee subject to a stay-at-home order (or who needs to care for someone subject to such an order) from claiming paid leave benefits if their place of employment has closed for other reasons, including because the employer was deemed by the government to be non-essential, or for lack of business, or for health and safety or other reasons.
- *Expanded FMLA Leave is Counted Together With Standard FMLA Leave*. Any period of expanded FMLA leave that an eligible employee takes counts towards the total of twelve workweeks of FMLA leave to which the employee is entitled for any qualifying reason in a twelve-month period. For example, a new parent who recently exhausted his or her standard FMLA leave would not be entitled to additional FMLA leave if the child's care provider (or an older child's school) is closed. These employees, however, would still be able to use emergency paid sick leave.
- *"Son or Daughter" Broadly Interpreted Consistent with the Standard FMLA Definition*. The term "son or daughter" has been interpreted to mean a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age, or 18 years of age or older who is incapable of self-care because of a physical or mental disability.
- *Small Employer Exemption Explained*. Employers with 50 employees are exempt from the child-care related provisions of the FFCRA when the imposition of such requirements would jeopardize the viability of the business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that (i) providing leave would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; (ii) the absence of an employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or (iii) the workforce is not sufficiently staffed to cover the services provided by the employee or employees requesting leave, and these services are needed for the small business to operate at a minimal capacity. Regardless of whether a small employer chooses to exempt one or more employees, the employer is still required to post or distribute a notice of rights under the FFCRA. If a small business decides to deny such leave to an employee, the employer must document the facts and circumstances to justify such denial and retain such records for its own files.
- *Small Employer Exempt from Specific Notice Requirements*. In recognition of the fact that employers with fewer than 50 employees may not have established policies and practices for administering FMLA leave, the DOL did not carry over for the FFCRA certain employer "specific notice" obligations that exist for the

standard FMLA (e.g., requiring employers to respond to employees who request or use FMLA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees' FMLA leave allowances).

Other DOL Guidance. As a source of less formal guidance, the DOL also established a "COVID-19 and the American Workplace" informational website (found here: https://dol.gov/agencies/whd/pandemic), which includes various fact-sheets, "question and answer" documents, and other related guidance. This website also includes the model form of notice that employers can distribute to employees to satisfy its requirement to provide notice to employees of these new rights. Employers may satisfy the FFCRA's posting requirement by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website.

Health Provisions

The law will temporarily increase, by 6.2 percentage points, the federal government's share of most Medicaid costs, which is known as the Federal Medical Assistance Percentage, and will also increase Medicaid grants for U.S. territories. The law will also expand coverage for the uninsured and the insured, as described below, and waive cost-sharing requirements that may otherwise prevent individuals from seeking needed testing for severe acute respiratory syndrome coronavirus 2 ("SARS-CoV-2"), the virus responsible for causing COVID-19.

CARE FOR THE UNINSURED

The law will also provide $1 billion to reimburse health care providers for claims for COVID-19-related tests and services provided to those without health insurance. The funds will pay claims for in vitro diagnostic testing for the detection or diagnosis of SARS-CoV-2 for uninsured individuals. The funds will also reimburse providers for certain items and services furnished to an uninsured individual during health care provider office visits (in-person and telehealth visits), urgent care center visits or emergency room visits that result in an order for or administration of such test, to the extent that such items and services relate to the test or the evaluation of an uninsured individual to determine the need for such a test.

The law will also provide states with the option of expanding Medicaid coverage to uninsured individuals for SARS-CoV-2 testing and any related health care provider visit.

REQUIRED HEALTH PLAN AND INSURANCE COVERAGE FOR TESTING

The CARES Act amended the FFCRA so that the law now requires most group health plans and health insurance issuers to provide coverage of testing for the detection of or diagnosis of SARS-CoV-2, including tests that have not been approved or cleared by the U.S. Food and Drug Administration ("FDA") or authorized by the FDA under an emergency use authorization. Group health plans and health insurance issuers are also required to cover health care items and services furnished during a visit to a health care provider (in-person and telehealth visits), urgent care center or emergency room, if the visit resulted in an order for or administration of a SARS-CoV-2 test, to the

extent the items and services relate to the test or the evaluation of an individual to determine the need for such a test. The law will require both tests and related health care items and services to be offered without any requirements for prior authorization, medical management or cost sharing (including deductibles, copays and coinsurance).

COST-SHARING WAIVERS FOR FEDERAL HEALTH CARE PROGRAMS AND CERTAIN INDIVIDUALS

The law will waive cost-sharing requirements for tests, services or both for beneficiaries or individuals covered under the following federal health care programs or other laws:

- Medicare Part B: Certain health care visits that result in an order for or administration of a SARS-CoV-2 test.
- Medicare Advantage: Tests, the administration of those tests, and specified COVID-19 testing services. Additionally, Medicare Advantage plans will not be able to impose prior authorization or utilization management requirements with respect to such tests or services.
- Medicaid: Tests, the administration of such tests, and specified COVID-19 testing services.
- Children's Health Insurance Program: Tests.
- TRICARE: Tests and related visits.
- Veterans: Tests and related visits.
- Federal Civilians: Tests and related visits.
- American Indians and Alaskan Natives receiving health services through the Indian Health Service ("IHS") or authorized under the care system funded by the IHS: Tests, COVID-19-related items and services, and visits.

Other Provisions

The law is designed to provide assistance to those most directly affected by the COVID-19 outbreak, such as the uninsured, low-income workers, children who depend on school being in session to receive meals and meal supplements, and low-income seniors who receive home-delivered meals or meals through adult care centers. The law will provide over $1 billion in food security assistance and will authorize the purchase of agricultural commodities for emergency distribution. The law's Emergency Unemployment Insurance Stabilization and Access Act would provide another $1 billion in emergency grants to states for unemployment compensation administration activities.

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