Proskauer

Federal Family First Coronavirus Response Act Signed Into Law

Law and the Workplace Blog on **March 18, 2020**

On March 18, 2020, President Trump signed into the law the Family First Coronavirus Response Act (the "Family First Act" or the "Act"). The Family First Act is a package of provisions aimed at providing emergency relief and support during the Coronavirus pandemic.

While we first reported on the Family First Act's potential impacts on employers in a blog covering the version of the bill first passed by the House of Representatives, since then the House approved technical amendments to the bill and the Senate passed this amended version of the bill on March 18. President Trump signed the Family First Act into law that same day.

The following is a summary of some of the key provisions of the employment-related aspects of the Family First Act. These provisions will take effect no later than April 2, 2020 (15 days from the date of enactment).

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act amends the federal Family and Medical Leave Act ("FMLA") to provide a new type of covered public health emergency leave for eligible employees of employers with fewer than 500 employees.

Beginning on the date the Act takes effect through December 31, 2020, eligible employees will be able to take up to 12 weeks of FMLA leave if the employee is unable to work (or telework) due to a need for leave to care for their son or daughter under 18 years old if the child's school or place of care has been closed, or the child's child care provider is unavailable, due to a public health emergency with respect to COVID-19 declared by a Federal, State, or local authority. To be eligible, a covered employee must be employed by the employer for at least 30 calendar days (as opposed to the eligibility criteria typically applicable under the FMLA for other covered reasons, which require that employees be employed for at least 12 months and have worked a certain number of hours).

Public health emergency leave would be a new category of leave added to the already existing categories of leave under the FMLA (for example, leave due to an employee's serious health condition). As such, the total available amount of time for all FMLA reasons combined would remain 12 weeks over a 12 month period, although employees eligible for public health emergency leave may not meet the eligibility criteria for other bases for FMLA leave.

The first 10 days of public health emergency FMLA leave may be unpaid, but employees may elect to substitute accrued paid leave during this time, including paid sick leave pursuant to the Emergency Paid Sick Leave Act (*discussed below*). Following the first 10 days of public health emergency FMLA leave, employers will be required to provide paid leave in an amount not less than two-thirds of an employee's regular rate of pay (as defined under the Fair Labor Standards Act ("FLSA")) for the remainder of the period of public health emergency FMLA leave period, up to 12 weeks (as needed). However, the two-thirds payment benefit is capped at $200 per day and $10,000 in the aggregate.

As under the existing provisions of the FMLA, employees taking public health emergency FMLA leave are entitled to be restored to their same or an equivalent position upon their timely return from leave. However, employers with fewer than 25 employees would not be required to comply with these job restoration requirements in connection with public health emergency FMLA leave if the following conditions are met:

- the employee takes public health emergency leave;
- the employee's position when they began leave does not exist due to economic conditions or other changes in the employer's operating conditions that (1) affect employment and (2) are caused by a public health emergency during the leave period; and
- the employer makes reasonable efforts to restore the employee to a position equivalent to one they held when leave began (*i.e.*, equivalent benefits, pay, terms and conditions of employment).

If reinstatement is not required because the above conditions are met, an employer would be required to make reasonable efforts to contact the employee if an equivalent position becomes available during the one year period beginning on the earlier of: (i) the date on which the qualifying need related to public health emergency concludes, or (ii) the date that is 12 weeks after the date on which the employee's public health emergency FMLA leave commences.

Importantly, given the circumstances, employers of employees who are health care providers or emergency responders may elect to exclude such employees from the public health emergency FMLA leave provisions. In addition, the Secretary of Labor will have the authority to issue regulations excluding certain health care providers and emergency responders from coverage, as well as exempting certain employers with fewer than 50 employees from coverage if imposing such requirements would jeopardize the viability of such employers' businesses.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act, which will in most cases operate in tandem with the Emergency Family and Medical Leave Expansion Act discussed above, will require employers with fewer than 500 employees to provide up to two weeks of paid sick leave to all employees for certain covered purposes related to the Coronavirus outbreak as discussed further below.

Specifically, the law will require covered employers to provide full-time employees with up to 80 hours of paid leave and part-time employees with a number of hours of paid leave that would equal the hours that such employee works, on average, over a 2-week period. Employees will have access to this leave, regardless of how long they have been employed by the employer.

The bill as enacted no longer includes language from the prior version of the bill which stated: "With respect to an employer that provides paid leave on the day before the date of enactment of this Act – (1) the paid sick time under this Act shall be made available to employees of the employer in addition to such paid leave; and (2) the employer may not change such paid leave on or after such date of enactment to avoid being subject to paragraph (1)." However, the final version of the law still provides that "[a]n employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under [the Act]."

Covered employees may use this emergency paid sick leave for the following reasons, to the extent they are unable to work or telework during the period in question:

1. if they are subject to a federal, state, or local quarantine or isolation order related to the Coronavirus;

2. if they have been advised by a heath care provider to self-quarantine due to concerns related to the Coronavirus;
3. if they are experiencing symptoms of the Coronavirus and are seeking a medical diagnosis;
4. if they are caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to the Coronavirus, or who has been advised by a heath care provider to self-quarantine due to concerns related to the Coronavirus;
5. if the employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or their child care provider is unavailable, due to Coronavirus precautions; and/or
6. if they are 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.

The Emergency Paid Sick Leave Act, as enacted, includes caps the amount of pay employees are entitled to receive during a covered leave period as follows:

- If employees take leave for reasons (1), (2), or (3) above, the emergency paid sick leave pay provided must be no less than the employee's regular rate of pay (again, as defined under the FLSA), up to a maximum of $511 per day and $5,110 in the aggregate.
- If employees take leave for reasons (4), (5), or (6) above, the emergency paid sick leave pay provided must be no less than two-thirds of the employee's regular rate of pay, up to a maximum of $200 per day and $2,000 in the aggregate.

Similar to the public health emergency FMLA provisions discussed above, employers of employees who are health care providers or emergency responders may elect to exclude such employees from the emergency paid sick leave provisions. The Secretary of Labor also has authority to issue regulations excluding certain health care providers and emergency responders from coverage, including by allowing the employer of such health care providers and emergency responders to opt out of the law. The Secretary of Labor may also issue regulations exempting employers with fewer than 50 employees from the need to provide emergency paid sick leave for an employee to care for a child if the child's school or child care provider is closed, where the imposition of such requirements would jeopardize the viability of the business.

Employers will be required to post a notice regarding employee rights under the law, and a model notice will be made available to employers for this purpose.

Tax Credits for Paid Sick and Paid Family and Medical Leave

Covered employers will be able to utilize payroll tax credits to cover the cost of wages paid to employees under the public health emergency FMLA leave and emergency paid sick leave programs described above. For a more comprehensive discussion of the tax credits to be made available, please refer to our Proskauer Tax Talks blog.

* * *

Employers should also be aware that states and localities may pass their own laws providing leave or other benefits in response to the Coronavirus pandemic. For example, on March 18, 2020, New York Governor Andrew Cuomo signed into law a bill providing for paid leave during certain periods of mandatory or recommended quarantine. Read more on our blog here.

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

View Original

Related Professionals

- **Evandro C. Gigante**
  Partner
- **Guy Brenner**
  Partner
- **Laura M. Fant**
  Special Employment Law Counsel
- **Arielle E. Kobetz**
  Associate