

To: Field Staff

From: Aileen O’Driscoll, Esq.

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**Re: Federal Legislative Update: Families First Coronavirus Response Act**

On March 18, 2020, the federal Families First Coronavirus Response Act (“FFCRA”) became law. The law, which takes effect on April 1, 2020 and expires December 31, 2020, introduces paid sick leave and expanded family and medical leave. While FFCRA also contains provisions which increase funding for Women, Infants, and Children (“WIC”) and Supplemental Nutrition Assistance Program (“SNAP”), what follows is a summary of provisions that apply to employees directly.

The U.S. Department of Labor has issued Fact Sheets and Questions and Answers that speak to both the emergency paid sick leave and expansion of family leave. This news release has links to the U.S. DOL’s various guidance documents: <https://www.dol.gov/newsroom/releases/whd/whd20200326>. The U.S. DOL had stated that it will be issuing further guidance and regulations.

**I. Emergency Expansion of FMLA**

**Eligibility**

The Act consists of a temporary emergency expansion of the Family Medical Leave Act (“FMLA”). First, the Act alters the threshold for FMLA coverage from private employers with 50 or more employees to cover those employers with fewer than 500 employees. It applies to all state public employers regardless of size. It also lowers the eligibility requirement to permit any employee who has worked for the employer for at least 30 days prior to the designated leave to be eligible to receive paid family and medical leave. One caveat to be noted: the Act permits the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave. In addition, the Act may exempt small businesses with fewer than 50 employees if the employer establishes that the required leave would jeopardize their business.

**Leave Provisions**

An individual employed by the employer for at least 30 days before the first day of leave may take up to 12 weeks of job-protected leave to care for the employee’s child (under 18 years of age) if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency. This is now the only qualifying need for Emergency FMLA.

The first 10 days of Emergency FMLA may be unpaid. During this unpaid ten-day period, an employee may elect to substitute any accrued paid time off (but an employer may *not* require such substitution). After the 10-day period, the employer pays full-time employees at two-thirds the employee's regular rate, based on the number of hours the employee would otherwise normally be scheduled to work, up to a maximum of \$200 per day and \$10,000 in the aggregate per employee. Employees who work a part-time are paid based on the average number of hours the employee works in a two-week period and for those with irregular schedules, based on the average hours worked in the six months prior to taking Emergency FMLA.

### **Job Restoration**

Similar to traditional FMLA provisions, employers with 25 or more employees must return any employee who has taken Emergency FMLA to the same or equivalent position upon the return to work. Employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to circumstances caused by the public health emergency, including an economic downturn.

### **Notification Requirement**

Additionally, if the need for leave is foreseeable, the employee must provide the employer with notice of leave, as is practicable.

## **II. Emergency Paid Sick Leave Act**

Within the FFCRA is the Emergency Paid Sick Leave Act ("EPSLA"), which provides up to 10 days of paid sick leave for full time employees and paid sick leave for part time workers equal to hours worked when the employee is unable to work or telework. This sick leave can be used for the following purposes:

1. The employee is subject to a federal, state or local quarantine order;
2. The employee is advised by a health care provider to self-quarantine;
3. The employee is experiencing COVID-19 symptoms and seeking medical diagnosis;
4. The employee is caring for an individual—including a non-family member—who is subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. The employee is caring for their minor child if the child's school or place of care is closed or the child's care provider is unavailable due to the public health emergency; **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.

This provision requires employers with fewer than 500 employees and all state public employers, regardless of size, to provide full-time employees, regardless of duration of employment, with 80 hours of paid sick leave at the employee's regular rate. Employers of healthcare providers or

emergency responders may exempt such employees. Further, the Secretary of Labor will have authority to exclude certain businesses from these requirements. Part time employees are entitled to the number of hours they ordinarily work on average over a two-week period; part time employees who work an irregular schedule would be entitled to leave based on the average number of hours the employee worked for the six months prior to taking paid sick leave.

If the reason for leave is reason 4, 5, or 6, above, paid leave is provided at two-thirds the employee's regular rate, capped at \$200 per day and \$2,000 total (\$12,000 aggregate over a 12-week period for reason 5). If the reason for leave is reason 1, 2, or 3 above, compensation is at full rate of pay, capped at \$511 per day up to \$5,110 total. Paid sick leave will not carry over to the following year and may be in addition to, not instead of, any paid sick leave currently provided by employers. Nothing in this law diminishes other rights or benefits under an existing employer policy, collective bargaining agreement, or other federal, state or local law.

This leave is available for immediate use, regardless of how long the individual employee has been working for the employer. Employers cannot require use of other paid leave prior to using this sick leave. The law includes protections for workers against retaliation, and employers cannot require employees to be involved in searching or finding a replacement while on leave. After the first day using this leave, employers may require the employee to follow reasonable notice procedures.

**IMPORTANT NOTES: 1-** The expanded FMLA and the EPSLA does NOT apply to those employees who were sent home prior to April 1, 2020 because of an employer's closure. Since all schools were closed before that date, these laws only apply to those who have continued to work, either remotely or in person. It would not provide leave or payments to anyone who has been laid off.

**2-** If an employee qualifies for paid leave under both the expanded FMLA and the EPSLA, they can only use one type of leave at a time (no double payments) and the combined leave can only be for up to a total of 12 weeks.

### **III. Emergency Unemployment Insurance Stabilization and Access Act**

Next, the Emergency Unemployment Insurance Stabilization and Access Act Of 2020 ("EUISAA") provides \$1 billion in 2020 to the states to support unemployment insurance benefits, including administrative costs.

### **IV. Health insurance Coverage for COVID-19 testing**

Finally, the FFCRA requires private health insurers to cover COVID-19 testing and related services to employees and their covered dependents, without cost sharing. This provision will have effect for the duration of the national emergency period.