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Families First Coronavirus Response Act: Next Steps for Employers

March 20, 2020

Families First Coronavirus Response Act

- U.S. Senate passed the Families First Coronavirus Response Act, H.R. 6201, which the U.S. House of Representatives had passed in a bipartisan vote on March 14 (with further changes made by the House by unanimous consent on March 16)
- President Trump signed the bill on March 18
- The leave provisions become effective on April 2, 2020, whereas the group health plan provisions are effective immediately

Calculating the Number of Employees

- How do companies determine if they meet the 500-employee threshold for the leave portions of the Act?
- The DOL will possibly issue guidance on the threshold, definitional issue
- At this point, employers should conduct an “integrated employer” analysis
 - Commonly used to determine coverage under the FMLA and various anti-discrimination laws

The FMLA's “Integrated Employer” Test

- **Common Management** – Authority over day-to-day operations
- **Interrelation Between Operations** – Common offices, recordkeeping, bank accounts, equipment, and personnel policies, directors, officers, etc.
- **Centralized Control of Labor Relations** – Common control over decision-making authority
- **Degree of Common Ownership/Financial Control** – Degree of ownership between the holding company and business units

Emergency Sick Leave

Emergency Sick Leave

- Private sector employers with fewer than 500 workers will have to provide employees who cannot work or telework with paid sick time off

Emergency Sick Leave: Eligibility

- If the employee is:
 - Subject to a COVID-19 quarantine or isolation order.

Emergency Sick Leave: Eligibility

- If the employee is:
 - An employee who has been advised by a health care provider to self-quarantine due to COVID-19 concerns.

Emergency Sick Leave: Eligibility

- If the employee is:
 - Experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

Emergency Sick Leave: Eligibility

- If the employee is:
 - Caring for:
 - an individual subject to a COVID-19 quarantine or isolation order; OR
 - an employee who has been advised by a health care provider to self-quarantine due to COVID-19 concerns.

Emergency Sick Leave: Eligibility

- If the employee is:
 - Caring for a child whose school or place of care is closed, or the child care provider of the child is unavailable, due to COVID-19 precautions.

Emergency Sick Leave: Eligibility

- If the employee is:
 - Experiencing any other substantially similar condition specified by HHS in consultation with the Treasury and Labor Departments.

Emergency Sick Leave: Benefits

- Full-time employees to receive 80 hours of sick leave
- Part-time workers to receive leave equivalent to their average hours worked in a two-week period
- Sick leave in either instance to be available for immediate use regardless of the employee's tenure at the employer

Emergency Sick Leave: Pay

- Workers taking leave for themselves will have to be paid at least their normal wage or the applicable federal, state or local minimum wage, whichever is greater
- By contrast, workers taking time off to care for family members must be paid at two-thirds of the foregoing rate, subject to caps

Emergency Sick Leave: Pay

- Sick leave is capped at \$511 per day and \$5,110 in the aggregate
- Wages required to be paid under the emergency sick leave provisions will not be subject to the 6.2 percent Social Security payroll tax typically paid by employers on employees' wages
- Paid sick time will not carry over from year to year

Emergency Sick Leave: Employer Obligations

- Employers with existing paid leave policies will be required to provide workers with the sick leave under this emergency program
- An employer cannot require a worker to use any other available paid leave before using the sick time
- Employers of employees who are health care providers or emergency responders may elect to exclude those employees from the emergency sick leave provisions

Emergency Sick Leave: Employer Obligations

- What if you have an unlimited paid time off (PTO) policy?

Emergency Sick Leave: Employer Obligations

- Employers will be prohibited from:
 - i. requiring workers to find replacements to cover their hours during time off; or
 - ii. discharging or discriminating against workers for requesting paid sick leave or filing a complaint against the employer related to such.

Emergency Sick Leave: Employer Obligations

- Employers will have to post a notice containing information regarding the emergency sick leave provisions
- The Labor Department is to create a model notice no later than 7 days after the Act is enacted

Emergency Sick Leave: Timing

- The leave provisions become effective on April 2, 2020, and expire on December 31, 2020

Emergency Sick Leave: Timing

- Can you apply leave retroactively?
 - All provisions of the Act will take effect 15 days after enactment and do not provide for retroactive benefits

Emergency Family Leave

Emergency Family Leave

- Private sector employers with fewer than 500 workers will have to provide up to 12 weeks of FMLA leave for employees who have been on the job for at least 30 days, and who are unable to work or telework because they have to care for a minor child if the child's school or place of care has been closed, or if the child care provider of that child is unavailable due to a COVID-19 emergency

Emergency Family Leave: Pay

- The first 10 days of leave can be unpaid (a worker could opt to use accrued vacation days or other available paid leave for those days)
- For subsequent days of leave, workers will receive a benefit from their employers equal to at least two-thirds of their normal pay rate
- The paid leave is capped at \$200 per day and \$10,000 in the aggregate

Emergency Family Leave: Pay

- Wages required to be paid under the emergency family leave provisions will not be subject to the 6.2 percent Social Security payroll tax typically paid by employers on employees' wages

Emergency Family Leave: Employer Obligations

- Generally, the employee on leave must be restored to his or her prior position
 - This requirement does not apply to employers with fewer than 25 employees if the position held by the employee on leave no longer exists due to economic conditions or other changes in the employer's operating conditions caused by the COVID-19 pandemic, *and* the employer makes reasonable efforts to restore the employee to an equivalent position

Can Leave Be Taken Intermittently?

- No!
 - 29 USC Sec 2612(b) of the FMLA sets forth the right to intermittent leave
 - This section was not amended by the new act

Intermittent Leave

- There is no provision in the Act that says that the public health emergency leave can be taken intermittently
- Some leave may be taken intermittently by agreement with the employer or when otherwise medically necessary

Spouses Taking Leave

- Can both spouses take leave?

Employer Tax Credits

Employer Tax Credits

- Refundable credits for the employer portion (but not the employee portion) of the Old-Age, Survivors, and Disability Insurance (OASDI) component of payroll taxes (i.e., the 6.2 percent employer portion of the Social Security tax) will be provided to employers to cover wages paid to employees for time off under the sick leave and family leave programs

Employer Tax Credits

- The sick leave credit for each employee is:
 - Equal to 100% of the sick leave wages required to be paid to the employee under this Act
 - Increased by qualified health plan expenses relating to those wages
 - Limited to \$511 per day while the employee is receiving paid sick leave to care for himself or herself, or \$200 if caring for a family member or child whose school has closed
 - Limited to 10 days total

Employer Tax Credits

- The family leave credit for each employee is:
 - Equal to 100% of the family leave wages required to be paid to the employee under this Act
 - Increased by qualified health plan expenses relating to those wages
 - Limited to \$200 per day
 - Limited to \$10,000 total

Benefit Plan Provisions

Benefit Plan Coverage During Leave

- FFCRA does not address how benefit plan coverage would be provided during a leave
 - FMLA rules apply to the expanded FMLA leave
 - Current benefit plan documents should address impact of leaves
- Issues to consider
 - Do the plan documents accurately and adequately describe how coverage is impacted by a leave of absence?
 - Do insurance policies continue to apply during the leave?

Required Health Plan Coverage

- Which plans must comply?
 - Any group health plan with at least 2 participants that are current employees (excludes retiree-only plans)
 - Excludes excepted benefits
 - Employer size does not matter
- Group health plans must cover certain COVID-19 testing and related health care visits at 100%
 - No deductibles, coinsurance, or copays
 - No prior authorization, utilization review, or medical management

Required Health Plan Coverage

- Covered items and services
 - in vitro diagnostic products for the detection of SARS-CoV-2 or the diagnosis of the virus that causes COVID-19 that are approved, cleared, or authorized under section 510(k), 513, 515 or 564 of the Federal Food, Drug, and Cosmetic Act, and the administration of such in vitro diagnostic products
 - Certain items and services furnished to a plan participant during a health care visit that results in an order for covered COVID-19 testing
 - Includes in-person office visits, telehealth visits, urgent care center visits, or emergency room visits
 - Coverage is required only to the extent that items or services furnished during the visit relate to:
 - The furnishing or administration of the covered testing; or
 - The evaluation of the individual to determine whether covered testing is needed.

Required Health Plan Coverage

- Full coverage is required for covered items and services that are provided
 - On or after March 18, 2020 and
 - During the public health emergency declared by the Secretary of the Department of Health and Human Services
- IRS notice 2020-15 should allow all required services to be covered without disqualifying a high deductible health plan
 - “ . . . a health plan that otherwise satisfies the requirements to be an HDHP under section 223(c)(2)(A) will not fail to be an HDHP merely because the health plan provides medical care services and items purchased related to testing for and treatment of COVID-19 prior to the satisfaction of the applicable minimum deductible.”
- IRS has not provided similar guidance on provision of telehealth services



QUESTIONS?