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*Client Alert* *UPDATED April 3, 2020*

# EMPLOYER OBLIGATIONS UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The U.S. House of Representatives passed the Families First Coronavirus Response Act (H.R. 6201) (FFCRA) on March 14, 2020, and the Senate approved it in a 90-8 vote on Wednesday, March 18. Now that President Trump has signed the bill, many American workers will be entitled to paid sick leave under the Emergency Paid Sick Leave Act (EPSLA) and job-protected and partially paid family leave under the Emergency Family and Medical Leave Expansion Act (EFLMEA).

The EFLMEA amends the Family and Medical Leave Act (FMLA) to provide temporary additional reasons for leave related to COVID-19, the novel coronavirus, and to provide pay at a reduced rate for the portion of the new FMLA leave that extends beyond 10 days. The EPSLA requires covered employers to provide up to 80 hours of paid sick leave to employees for absences related to COVID-19. For purposes of private employers, the legislation applies only to employers with ***fewer than 500 employees.***

Thompson & Knight has been closely monitoring the legislative activity, and we have summarized the key employment-related provisions of the FFCRA below. There are a number of technical issues in the legislation that will need to be accounted for as covered employers implement the new law.

***UPDATED:*** On March 24, the U.S. Department of Labor (DOL) issued a Q&A on the FFCRA answering "critical questions," including which businesses are covered and how they should calculate workers' pay. The DOL updated the Q&A late on March 26 and 29, and issued its final rule implementing the EPSLA and the EFMLEA on April 1. The remainder of this Alert has been updated to address the most recent Q&A update and the final rule. A detailed analysis of the final rule can be found here. In addition, the FFCRA changes our answers to some of the COVID-19 "Frequently Asked Questions" we posted previously, and we have posted an updated FAQ here. Finally, the DOL issued on March 24 the "Employee Rights" notice that covered employers must post under the FFCRA. The statute requires the notice to be posted in a conspicuous place on the covered employer's premises. The DOL posting guidance, however, notes that this requirement may be satisfied by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website.

## KEY TAKEAWAYS FROM THE DOL'S Q&A (UPDATED APRIL 3):

- The EFMLEA and the EPSLA take effect on **Wednesday, April 1**, not April 2 as initially thought. It appears the DOL either decided to make the acts effective early or miscalculated the effective date.

- Leave under both laws runs concurrently and is not retroactive. Any leave taken before April 1 does not count against the leave entitlements.

- Covered employers must pay these benefits unless they qualify for an exemption. There are provisions in the FFCRA that provide tax credits to employers with certain caps. See our alert on that subject.

- The calculation of whether an employer has fewer than 500 employees is dynamic, meaning that employers must determine coverage at the time leave is taken. In determining coverage, employers should:

    - count full-time and part-time employees within the United States, the District of Columbia, and any territory or possession of the United States;

    - include employees on leave;

    - count jointly-employed temporary employees regardless of whether the employees are maintained on another employer's payroll;

    - count day laborers supplied by a temporary agency if there is a continuing employment relationship; and

    - exclude independent contractors.

- A corporation (including its separate establishments or divisions) typically is considered to be a single employer and all its employees must each be counted.

- Where an entity has an ownership interest in another entity, the two entities are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether there is coverage.

- In general, two or more entities are separate employers unless they meet the integrated employer test under the FMLA. If integrated, coverage is determined by counting the employees at each entity. Factors considered include:

    - whether there is common management;

    - the degree of interrelation between operations;

    - whether there is centralized control of labor relations; and

    - the degree of common ownership or financial control.

- Small businesses with fewer than 50 employees are exempt from paying sick leave under the EFMLEA (or under the EPSLA for the same reason) if doing so would jeopardize the viability of the business as a going concern. To elect this exemption, employers should document why their business meets certain set criteria but not send that documentation to the DOL. The criteria and what employers seeking the exemption are required to do is addressed in our alert on the DOL's final rule implementing the EPSLA and EFMLEA.

- The EFMLEA applies to all employees of covered employers who have been employed for 30 calendar days. (The usual FMLA requirements of one year of employment, 1,250 hours of work, and working at a location where there are 50 employees within a 75-mile radius do not apply.) The Coronavirus Aid, Relief, and Economic Security (CARES) Act clarified that an employee is still eligible for EFMLEA if he or she was laid off after March 1, had worked for the employer not less than 30 days of the last 60 days prior to the layoff, and was later rehired by the employer.

- Employees must provide, and employers retain for four years if they intend to claim a tax credit under the FFCRA, appropriate documentation supporting the reason for the qualifying leave. Our alert discussing the EPSLA and EFMLEA regulations discusses the documentation requirements.

- Leave may be taken intermittently while teleworking if the employer agrees. Leave cannot be taken intermittently if the employee is working at his/her usual worksite, unless the employer agrees to intermittent leave and the employee is taking the leave to care for a child whose school has closed or whose childcare is unavailable. Otherwise, leave is intended to be taken in full-day increments.

- Leave is not available if an employer closed the worksite before the effective date or does so after the effective date, or furloughs an employee. This is true even if the reason for the closure or furlough was lack of business or to comply with a governmental directive.

- To be entitled to EPSLA or EFMLEA leave, the employee must be unavailable to work because of a qualifying reason and the employer must have work (or telework) for that employee to do. If the employer does not have work (or telework) for the employee, then he or she is not eligible for leave under the EPSLA or the EFMLEA

- Employer-provided paid leave may be used to supplement paid leave under the EFMLEA, if the employer and employee agree, so that the employee receives the full amount of his or her normal pay.

- A "son or daughter" for purposes of the FFCRA includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom an employee has day-to-day responsibility to care for or support financially. "Son or daughter" also includes an adult (i.e., a person 18 years of age or older) who is mentally or physically disabled and incapable of self-care.

- Employers must provide the same (or a nearly equivalent) job to an employee who returns to work following leave, but employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether leave was taken. (There are "key employee" exceptions to the restoration requirement and exceptions for employers with fewer than 25 employees.)

- The maximum amount of FMLA (including EFMLEA) leave that can be taken during a twelve-month measurement period is twelve weeks, inclusive of qualifying leave taken for any purpose earlier. But, an employee's entitlement to EPSLA leave is not impacted by the employee's previous use of FMLA leave.

- A "health care provider," as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19, means a licensed medical doctor, nurse practitioner, or other health care providers permitted to issue a certification for purposes of the FMLA.

- Employers may elect to exclude employees who are health care providers and emergency responders from the application of paid leave benefits. The definitions of "health care providers" and "emergency responders" are broad, so employers should examine the regulations to determine whether they can elect to exclude employees from EFMLEA or EPSLA benefits.

## THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

The EFMLEA amends the FMLA to provide 10 days of protected unpaid leave (subject to the paid sick leave under the EPSLA) and up to 10 weeks of protected paid leave to eligible employees who are unable to work (or telework) because they need to care for children due to school closures or the unavailability of childcare for a COVID-19-related reason. Employees are eligible for this leave if they have been employed for at least 30 calendar days. The paid 10 week portion of the leave is calculated at two-thirds of the employee's regular rate, subject to the statutory cap of $200/day or $10,000 in the aggregate. If an employee has any paid personal or sick days, the employee may elect to use those paid leave days during the 10 days of unpaid leave under the EFMLEA.

## THE EMERGENCY PAID SICK LEAVE ACT (UPDATED 3/27/20)

Under the EPSLA, covered private employers are required to provide employees with up to 80 hours of paid sick leave (or the equivalent of the average number of hours an employee works during a two-week period for part-time employees) over a two-week period for the COVID-19-related reasons described below.

Employees are entitled to paid sick leave under the EPSLA at their full pay rate, subject to the statutory cap of $511/day or $5,110 in the aggregate, for the following reasons:

- They are subject to a governmental quarantine or isolation order related to COVID-19;

- A healthcare provider has advised them to self-quarantine due to COVID-19-related concerns; or

- They are experiencing symptoms of COVID-19 and are seeking a medical diagnosis.

**UPDATED 4/3/20:** In the newly-released regulations, the DOL clarified the meaning of a "quarantine or isolation order" to include the sort of "shelter-in-place" or "stay-at-home" orders that have been issued by most states and any number of counties and cities. In addition, recommendations from government authorities advising "categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine" are covered as well. Accordingly, the "shelter-in-place" or "safe-at-home" orders that have been issued by various state and local governments (including those affecting Dallas, Houston, Austin, Fort Worth, and San Antonio) are qualifying "quarantine or isolation orders" under the EPSLA. The executive order issued by Governor Abbott mandating a 14-day self-quarantine for

travelers arriving by air from New York Tri-State Area and New Orleans will also trigger the EPSLA's requirements. However, only those employees who would be able to work or telework "but for being subject to the order" **and for whom the employer has work** are eligible. That means an employee may not take Paid Sick Leave if the employer does not have work for the employee as a result of the order or other circumstances.

Employees are entitled to paid sick leave under the EPSLA at two-thirds of their regular pay rate, subject to the statutory cap of $200/day or $2,000 in the aggregate, for the following reasons:

- They are caring for an individual who is subject to a quarantine or isolation order or is experiencing COVID-19 symptoms and is seeking medical treatment;
- They are caring for a child because the child's school or daycare has closed, or the child's child-care provider is unavailable, because of COVID-19; or
- The employee is experiencing a "substantially similar condition" as identified by the Secretary of Health of Human Services.

Employees are immediately entitled to paid sick time under the EPSLA regardless of the duration of their employment. Employers cannot require employees to use other paid leave before using leave provided under the EPSLA.

Finally, the law prohibits employers from discriminating or retaliating against employees who take the sick leave provided and includes penalties for covered employers who fail to provide the required sick leave.

## THE CARES ACT (UPDATED 3/27/20)

The CARES Act made a few minor clarifications to the EFMLEA and the EPSLA, including that the monetary leave benefit caps are per-employee and not an overall per-day cap. It also clarified that an employee is still eligible for EFMLEA if he or she was laid off after March 1, had worked for the employer not less than 30 days of the last 60 days prior to the layoff, and was later rehired by the employer. For further information about the CARES Act, see our full summary here.

**QUESTIONS?** If you have any questions about these and other complex legal and practical issues raised by these new laws, we have the experience and expertise to help. Please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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