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Paid Sick and Family Leave Enacted into Law in Response to Coronavirus

After extensive negotiations between the House of Representatives and the Senate, Congress finally passed the Families First Coronavirus Response Act, (FFCRA) which was then signed into law by President Trump. This highly anticipated legislation consists of various forms of economic relief that aim to assist families and workers who are sick, quarantined, or otherwise unable to obtain critical services due to the ongoing Coronavirus ("COVID-19") pandemic. There are several critical components of this relief package that will have a significant impact on employers and employees alike, including mandatory paid sick leave and paid family medical leave for covered employers, as well as related tax credits and efforts to stabilize and implement effective unemployment compensation practices.

Emergency Paid Sick Leave

The Emergency Paid Sick Leave Act ("EPSA") paid sick time will be available for immediate use by employees of a covered employer who are unable to work (or telework) due to any of the following reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
3. To obtain medical diagnoses or care if the employee is experiencing symptoms of the virus;
4. To care for or assist a family member of the employee for the same reasons that an employee may need sick leave stated in Nos. 1-3 above;
5. To care for the child of an employee if their school or childcare facility is closed, or the childcare provider is unavailable due to coronavirus precautions; 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.

The law does not specify the type of documentation employers can require for EPSA leave, so employers may need to be flexible with when and how this is documented until there is further guidance.

Covered employers include most private sector employers with fewer than 500 employees, and a significant number of public sector employers, regardless of size. The amount of paid sick time employees are entitled to take is as follows:

1. For full-time employees - 80 hours of paid sick time.
2. For part-time employees - an amount of paid sick hours equivalent to the number of hours the employee works, on average, over a two-week period. (For example, if an employee works an average of 30 hours per week, that employee would be entitled to 60 hours of paid sick time.)

Unlike the earlier draft version of this Act, the EPSA leave does not need to be provided in addition to paid sick leave that is already available under an employer's existing policy (provided that such policy complies with the minimum requirements of this Act). Paid leave under the Act is capped at \$511 per day and \$5,110 in the aggregate for a use described under

Nos. 1-3 above, and capped at \$200 per day, or a maximum of \$2,000 for any use covered under Nos. 4-6 above (i.e. caring for a family member).

The EPSA recognizes two exceptions in which covered employers may not be required to provide paid sick leave:

1. Employers with less than 50 employees may be exempt from providing paid sick leave if they can show that imposition of this requirement would jeopardize the viability of their business as a going concern; and
2. Health Care Providers and emergency responders may elect to exclude employees from taking paid sick leave as provided for under the EPSA. In this context, Health Care Providers include a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices, or any podiatrists, dentists, clinical psychologists, optometrists, and chiropractors as determined by law to be capable of providing health care services.

An employee may use EPSA sick leave before other accrued PTO, but an employer cannot require an employee to use accrued PTO provided by the employer before using paid EPSA sick leave provided by the Act. Employers can, however, require employees to provide "reasonable notice" in order to use sick leave under the Act.

The EPSA becomes effective within 15 days of being enacted and it will continue until December 31, 2020. Leave under this Act will not carry over to 2021. Employers are not required to pay out unused paid sick leave upon an employee's separation from employment.

Employers cannot require employees to search for or find replacements to cover their shifts in order to use sick time. Employers are also prohibited from discriminating or retaliating against employees who request paid sick leave or raise any complaints concerning EPSA leave.

Notices must be posted that are visible to all employees regarding their rights under the EPSA. Employers who fail to provide appropriate paid sick leave will be subject to applicable penalties as if they violated federal wage and hour laws under the FLSA. Given that many employees are now working remotely, we suggest that employees be emailed a copy of the notice or that it be posted on a company's intranet, in addition to actually posting in the workplace.

Emergency Family and Medical Leave

The Emergency Family and Medical Leave Expansion Act ("EFMLA"), provides certain benefits to eligible employees who are not able to work (or telework) due to COVID-19. The EFMLA sets forth temporary requirements and additional benefits under the federal Family and Medical Leave Act.

Under EFMLA, employees of a "covered employer" have been employed for at least 30 calendar days, will be entitled to take up to 12 weeks of leave to care for an employee's son or daughter under 18 years of age if : (1) the child's school (including elementary or secondary school) or place of care is closed; or (2) the childcare provider is unavailable due to public health emergency with respect to COVID-19 (as declared by federal, state or local authority). Covered employers under the EFMLA are the same as those required to offer paid sick leave as described above (employers with fewer than 500 employees, unless they meet one of the two exemption criteria).

The first 10 days of EFMLA leave may consist of unpaid leave; however the employee can substitute any accrued paid sick, vacation or personal leave for unpaid leave during this period. For every additional day of EFMLA leave that the employee requires and is entitled to receive up to 12 weeks, employers must pay the employee at least 2/3 of the employee's regular rate of pay, up to \$200 per day, and a maximum of \$10,000 in total.

If the need for EFMLA leave is foreseeable, the employee should provide notice of the leave as soon as practicable. Employees are generally entitled to be restored to the same or equivalent position that the employee had before their leave. However, an employer with fewer than 25 employees is not required to restore an employee to an equivalent

position upon return from EFMLA leave, if that position is no longer available due to economic hardship caused by COVID-19, provided that the employer has made reasonable efforts to restore to the employee to an equivalent position during the “contact period.” For purposes of the EFMLSA, the contact period means the one-year period beginning on the earlier of: (1) the date on which the employee’s need for EFMLA concludes; or (2) the date that is 12 weeks after the start date of the employee’s EFMLA leave.

For both Paid Sick Leave and Emergency Family and Medical Leave there are special rules for employers who are subject to multi-employer bargaining agreements. Employers who are subject to such agreements, or who otherwise have questions about the impact of these new laws on existing CBAs should contact one of Saul Ewing Arnstein & Lehr’s experienced labor law counsel for assistance.

Tax Credits for Paid Sick and Family Leave

Employers who are required to provide paid sick and family leave as a result of the FFCRA will be allowed certain tax credits for each calendar quarter in which paid leave was paid under this Act. These tax credits will be limited based on the amount of wages paid to the employee for paid sick time or paid family leave.

Employers have the choice to opt-out of this tax credit, but should first consult with one of Saul Ewing Arnstein & Lehr’s tax attorneys or otherwise qualified tax professionals to determine the most appropriate option for their business.

Emergency Unemployment Insurance

The final employment-law component of the federal COVID-19 relief package pertains to the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (“EUIA”). Under the EUIA, the Secretary of Labor shall provide emergency funds in the amount of \$1 billion to the states in the Unemployment Trust for activities related to processing and paying unemployment insurance (UI) benefits. This includes resources for staffing, technology and other administrative costs necessary to process UI claims, as well as special funding for states which experienced at least a 10 percent increase in unemployment insurance claims over the same quarter in the previous calendar year.

Takeaways

Employers impacted by these new laws should immediately prepare to implement paid sick leave and family leave as required by the FFCRA. Business owners and managers should assess the scope of their workforce, secure financial resources necessary to pay employees for sick time and family leave, prepare written notices to employees regarding related policies, and train human resources on implementing such policies and processing related leave requests.

In the event that your business is unable to continue certain operations due to government orders, mass quarantines, or other unforeseen financial constraints stemming from the COVID-19 outbreak, you should determine whether employees can work remotely or at a reduced schedule, or if furloughs or layoffs may be required. In these difficult and unprecedented circumstances, it is critical to have the tools and resources in place to make swift adjustments to business operations, while staying the course of complying with applicable federal, state and local labor and employment laws. Contact one of Saul Ewing Arnstein & Lehr’s employment law counsel if you have questions about recent COVID-19 laws and leave policies, government orders, office closures, or related employment issues.

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