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LEGAL UPDATE

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Information on Pending Federal Legislation Related to COVID-19: Family and Medical Leave and Sick Leave

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On Monday, March 16, 2020, Bassford Remele distributed a summary of the “Families First Coronavirus Response Act,” which was passed by the United States House of Representatives over the weekend. An amended version of the Act (referred to as “Phase Two”) was signed into law by the President last night. Below is a summary of the changes and final version of the Act. Please note that the Act requires employers to post notice of these new laws in the same area where the employer posts required notice of other HR-related laws.

Congress is currently working on larger stimulus package (“Phase Three”) that may expand the Act enacted yesterday. We will continue to monitor this important legislation and provide updates for you. In the meantime, please feel free to contact us with any questions.

What has changed since Monday, March 16, 2020?

The House passed a resolution amending the Families First Coronavirus Response Act late Monday night. There were a number of significant changes, including:

(1) FMLA Amendment:

- The three “qualifying reasons for leave” under the initial amendment have narrowed to one reason: If an employee is unable to work (or telework) to care

for a child because the child's school or childcare has been closed or is unavailable due to a public health emergency.

- The number of days of unpaid leave has also been reduced from 14 to 10.
- Paid leave under the Act is also now capped for each employee at \$200 per day and \$10,000 total.
- Please note that traditional FMLA leave may still apply for an employee who contracts the coronavirus or needs to care for a family member who contracts the coronavirus.

(2) Emergency Paid Sick Leave Act:

- "Full pay" for an individual taking the emergency paid leave for personal care is now capped for each employee at \$511 per day and \$5,110 total.
- "Full pay" for an individual taking the emergency paid leave to care for a family member is now capped for each employee at \$200 per day and \$2,000 total.

(3) Industry Exemptions: Health-care professionals and emergency responders are now exempted from the FMLA Amendments and the Emergency Paid Sick Leave Act.

(4) Small Employers Protected From Civil Damages: Employers with fewer than 50 employees in a 75-mile radius are exempt from civil FMLA damages in any lawsuit alleging a violation of these FMLA Amendments.

The bill will take effect on April 2, 2020, and will sunset on December 31, 2020, unless extended by Congress.

Final Summary of the Families First Coronavirus Response Act:

I. AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT

Covered Employer: An employer (1) that is not a health-care provider or emergency responder and (2) has fewer than 500 employees. The Department of Labor can issue regulations to exempt employers with fewer than 50 employees for reasons of financial hardship.

Covered Employee: Any employee that has been on the employer's payroll for 30 days.

Amount of Leave: Up to 12 weeks.

Reasons for Leave: A covered employee can take leave to care for a child of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable, due to coronavirus.

Compensation During Leave: The first 10 days of leave may be unpaid, but an employee can choose to substitute accrued vacation leave, personal leave, or other medical or sick leave during the leave. The employer cannot force an employee to use their accrued paid leave.

After 10 days of unpaid leave, employers must provide paid leave of at least two-thirds the employee's regular rate of pay for the number of hours the employee would have been normally scheduled, capped at \$200 per day and \$10,000 total.

Restoration Rights: Employer must return employees to the same or a similar position upon end of leave. Employers with fewer than 25 employees are exempt from this requirement if the position ceases to exist due to economic downturn from COVID-19, subject to some conditions.

Tax Credits for Employer: Employers get a tax credit for 100% of qualified family leave wages required to be paid, up to \$200 per day, against the employer's portion of Social Security taxes. If that total credit amount exceeds the employer's total Social Security tax liability, the difference is paid to the employer as a refund.

II. EMERGENCY PAID SICK LEAVE ACT

Covered Employer: An employer (1) that is not a health-care provider or emergency responder and (2) has fewer than 500 employees.

Covered Employee: Any employee.

Amount of Leave: Up to two weeks.

Reasons for Leave: A covered employee can take leave if:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine because of COVID-19;
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- The employee is caring for an individual subject or advised to quarantine or isolation;
- The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
- The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Compensation During Leave: Full-time employees are paid at their regular rate of pay, capped at \$511 per day and \$5,110 total. However, when the employee is absent to care for a family member, leave is paid at two-thirds the employee's regular rate, capped at \$200 per day and \$2,000 total. Part-time employees are paid the number of hours that the employee works, on average, over a two-week period.

Existing Paid Leave Policy: Any standard paid leave provided before the law is enacted cannot be credited against the employee's paid leave entitlement. However, hours cannot be carried over after December 31, 2020.

Tax Credits for Employer: Employers get a tax credit for 100% of leave wages required to be paid, up to \$511 per day, against the employer's portion of Social Security taxes. If that total credit amount exceeds the employer's total Social Security tax liability, the difference is paid to the employer as a refund.

Friday, March 13, 2020 Summary

On Friday, March 13, 2020, the United States House of Representatives passed the “Families First Coronavirus Response Act.” The bill has not yet been passed by the Senate or signed into law by the President. However, employers may wish to take these potential requirements into consideration as they develop policies and procedures regarding COVID-19.

III. AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT

Covered Employer: An employer with fewer than 500 employees. The Department of Labor can issue regulations to exempt employers with fewer than 50 employees for reasons of financial hardship.

Covered Employee: Any employee that has been on the employer’s payroll for 30 days. The Department of Labor can issue regulations to exclude some health care providers from eligibility.

Amount of Leave: Up to 12 weeks.

Reasons for Leave: A covered employee can take leave:

- (i) To comply with recommendation or order of public health official due to exposure to or symptoms of coronavirus.
- (ii) To care for a family member whose presence in the community would jeopardize the health of other individuals because of the exposure of such family member to coronavirus or exhibition of symptoms of coronavirus by such family member.
- (iii) To care for a child of an employee if the child’s school or place of care has been closed, or the childcare provider is unavailable, due to coronavirus.

Compensation During Leave: The first 14 days of leave may be unpaid, but an employee can choose to substitute accrued vacation leave, personal leave, or other medical or sick leave during the leave. The employer cannot force an employee to use their accrued paid leave.

After 14 days of unpaid leave, employers must pay FMLA leave at no less than two-thirds the employee’s regular rate of pay for the number of hours the employee would have been normally scheduled.

Restoration Rights: Employer must return to same or similar position upon end of leave. Employers with fewer than 25 employees may be exempt if position needs to be eliminated due to economic downturn from COVID19, subject to some conditions.

Tax Credits for Employer: Employers get a tax credit for 100% of qualified family leave wages required to be paid, up to \$200/day, against the employer’s portion of Social Security taxes. If that total credit amount exceeds the employer’s total Social Security tax liability, the difference is paid to the employer as a refund.

IV. EMERGENCY PAID SICK LEAVE ACT

Covered Employer: An employer with fewer than 500 employees.

Covered Employee: Any employee.

Amount of Leave: Up to 2 weeks.

Reasons for Leave: A covered employee can take leave to:

- Self-isolate because the employee is diagnosed with COVID-19
- Obtain a medical diagnosis or care if the employee is experiencing the symptoms of COVID-19
- Comply with a public official or a health care provider order or recommendation that the physical presence of the employee on the job would jeopardize the health of others
- Care for the employee's family member who is self-isolating because the family member has been diagnosed with or is experiencing symptoms of COVID-19 and/or needs to obtain medical diagnosis or care
- Care for the child of such employee if the school or child care has been closed due to COVID-19

Compensation During Leave: Full-time employees are paid at their regular rate of pay. However, when the employee is absent to care for a family member, leave is paid at two-thirds the employee's regular rate. Part-time employees are paid the number of hours that the employee works, on average, over a 2-week period.

Existing Paid Leave Policy: Any paid leave provided before the law is enacted cannot be credited against the employee's paid leave entitlement. However, hours cannot be carried over after December 31, 2020.

Tax Credits for Employer: Employers get a tax credit for 100% of leave wages required to be paid, up to \$511/day, against the employer's portion of Social Security taxes. If that total credit amount exceeds the employer's total Social Security tax liability, the difference is paid to the employer as a refund.

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