

Employer Obligations Under the Families First Coronavirus Response Act

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act, H.R. 6201 (“Families First Act”). The Families First Act applies to employers with less than 500 employees and contains, among other things: (1) the **Emergency Family and Medical Leave Expansion Act** (“EFMLA”); and (2) the **Emergency Paid Sick Leave Act** (“EPSLA”). Effective April 2, 2020, the Families First Act also provides for quarterly tax credits to employers to offset the cost of the paid sick leave and FMLA at an amount equal to 100% of qualified sick leave wages paid and qualified family leave wages paid.

Notably, the Act allows the Secretary of Labor to issue regulations to exempt small businesses (less than 50 employees whose imposition of paid sick leave would “jeopardize the viability of the business as a growing concern”), as well as certain health care providers and emergency responders from the new leave requirements. However, until such regulation is actually enacted, there is no exemption and employers should proceed as if covered if you employ less than 500 employees.

Emergency Family and Medical Leave Expansion Act

EFMLA expands the Family and Medical Leave Act (“FMLA”) to all employers under 500 to provide “Public Health Emergency Leave”. EFMLA is available to all employees (including part-time) who have been employed at least 30 days. Like FMLA, EFMLA protects employee’s jobs for up to twelve (12) weeks, but is applicable only if the employee is unable to work (including telework) because they need to care for their minor child if the child’s school or place of care is closed, or the child care provider is unavailable, due to COVID-19.

The first two (2) weeks (or ten (10) working days) of EFMLA are unpaid (though employees may receive emergency paid sick leave for up to eighty (80) hours as detailed below which will cover this 10 day time). Unlike FMLA, if an employee needs leave under EFMLA, employers must provide paid leave for the remainder of the ten (10) weeks in an amount of at least two-thirds (2/3) of an employee’s “regular rate” of pay for “the number of hours the employee would otherwise be normally scheduled to work.”

The rate of pay for employees whose schedule varies is the average number of hours the employee was scheduled per day (including leave time such as PTO) over the 6 month period ending on the date on which the employee takes EFMLA. If the employee has not worked that long, the rate of pay is based on the “reasonable expectation of the employee at the time of hiring of the average number of hours per day” they would be scheduled to work.

Notably, this paid leave is capped at \$200 per day (the amount of the tax credit) and \$10,000 in the aggregate per employee. In addition, the requirement to restore employees to their position may not apply to employers with less than 25 employees, under certain conditions. Employers subject to a multiemployer CBA may make contributions to the multiemployer fund, plan or program, consistent with the EFMLA’s requirements. And finally, while employees do not have

a private right of action to sue an employer for violation of EFMLA, the DOL may still investigate and sue on their behalf.

Emergency Paid Sick Leave Act

Under the EPSLA, employers must immediately provide employees paid sick time when they are unable to work for the following reasons related to COVID-19:

1. The employee is subject to a quarantine or isolation order.
2. The employee has been advised by a health care provider to self-quarantine.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in 1 or 2, above.
5. The employee is caring for their son or daughter if the school or place of care for the son or daughter has been closed, or the child care provider is unavailable.
6. The employee is experiencing other substantially similar condition.

Full-time employees are entitled to up to eighty (80) hours of emergency paid sick leave under the EPSLA. Part-time employees are entitled to paid leave hours equal to the average number of hours that the employee works over a two-week period. However, employers do not need to pay more than \$511 per day (and \$5,110 in the aggregate) for reasons 1-3 above, and \$200 per day (and \$2,000 in the aggregate) for reasons 4-6 above, which correspond to the limit on tax credits allowed for employers. Employers subject to a multiemployer CBA may make contributions to the multiemployer fund, plan or program, consistent with the EFMLA's requirements.

An employer may not require an employee to use other employer-provided paid leave first. Also, employers may not require employees to find a replacement for their shift. However, employers may require an employee to follow reasonable notice procedures to continue to receive paid sick time. Further, employers must post a notice (the Secretary of Labor has 7 days to create) of employees' rights under the EPSLA. Finally, the DOL will be issuing related regulations to provide employers further guidance. EPSLA expires December 31, 2020 and unused paid sick leave does not carry over into 2021.

Minnesota Unemployment Benefits

On March 16, 2020, Minnesota Governor Tim Walz issued Emergency Executive Order 20-05, effectively immediately, suspending "strict compliance" with the Minnesota Unemployment Insurance Law until December 31, 2020. Applicants are eligible for unemployment benefits if:

- a. A determination has been made by health authorities or by a health care professional that the presence of the applicant in the workplace would jeopardize the health of others, whether or not the applicant has actually contracted a communicable disease;
- b. A quarantine or isolation order has been issued to the applicant;

- c. There is a recommendation from health authorities or by a health care professional that the applicant should self-isolate or self-quarantine due to elevated risk from COVID-19 due to being immunocompromised;
- d. The applicant has been instructed by their employer not to come to the employer's place of business due to an outbreak of a communicable disease; or
- e. The applicant has received a notification from a school district, daycare, or other childcare provider that either classes are canceled or the applicant's ordinary childcare is unavailable, provided that the applicant made reasonable effort to obtain other childcare and requested time off or other accommodation from the employer and no reasonable accommodation was available.

In addition:

- The unpaid waiting week is suspended (it will be paid “as quickly as possible).
- Recipients of unemployment do not need to actively seek suitable employment that puts their health or safety at risk, or that of others. Workers that have been laid off temporarily may meet this requirement by staying in contact with their employer.
- Unemployment benefits paid as a result of COVID-19 will not be used in computing the future unemployment tax rate of a taxpaying employer.
- The five-week benefit limitation is waived for business owners.

The executive order is in effect during the peacetime emergency declared in Executive Order 20-01.

If you have questions regarding the Coronavirus legislation or executive order, or other labor or employment issues, please contact Martin Kappenman at 952 921 4603 or mkappenman@prkalaw.com or any other attorney at Peters, Revnew, Kappenman & Anderson, P.A.