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**Employee Benefits - Families First Coronavirus Response Act**

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act and Emergency Family and Medical Leave Expansion Act, (The “Acts”). The purpose of the Acts is to provide employees and family members affected by Coronavirus with paid sick leave. The effective date of the Acts is April 1, 2020 and applies to leave taken between April 1, 2020 and December 31, 2020. Additionally, the FFCRA is not retroactive, and any benefits provided by employers now through March 31, 2020 cannot be counted towards the FFCRA in any way.

There are two types of benefits. The Families First Act provides up to ten paid sick days. If the leave is because of the employee’s illness, or is government-mandated, the employee is eligible for up to \$5,110 in pay. If the leave is to care for a family member, or because schools are closed or childcare is not available, the employee is eligible for up to \$2,000 in pay. The FMLA Expansion Act allows up to 12 weeks off because schools are closed or childcare is not available, with the maximum benefit to the employee at \$10,000.

**WHAT EMPLOYERS MUST COMPLY?**

Effective April 2, 2020, all public employers and private employers with fewer than 500 employees must provide the benefits mandated by these laws. Employers of 50 employees or less may apply to the Department of Labor (the “DOL”) for an exemption if complying would jeopardize the viability of the business. The law requires the DOL to issue regulations by April 2, 2020, so we expect further guidance soon.

Private employers meet the 500-employee threshold if at the time that the employee’s leave is taken, the employer employs 500 full-time and part-time employees within the United States. The count must include employees on leave, temporary employees and day laborers supplied by temp agencies. Workers who are independent contractors, rather than employees, are not considered employees for purposes of the 500-employee threshold.

**WHAT EMPLOYEES ARE ELIGIBLE?**

All employees are eligible for the paid sick leave. For the expanded FMLA benefit, only employees who have been employed by their current employer for at least 30 days are eligible.

Employers of health care providers or emergency responders can exclude such workers from the expanded FMLA benefit. The Sick leave Act allows such exclusion only with permission from the DOL.

### **UNDER WHAT CONDITIONS MAY THE EMPLOYEE RECEIVE EITHER THE PAID SICK LEAVE OR EXPANDED FMLA LEAVE?**

Employees may receive paid sick days for 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. 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 subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
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.

Eligible employees can receive the expanded FMLA leave if they are unable to work (including unable to work remotely) because they need to care for a son or daughter because the child's school or place of care has been closed. The child must be under 18 years of age. This also applies if the childcare provider—presumably a nanny or other caretaker compensated for such services—is unavailable due to COVID-19.

### **HOW MUCH PAY IS THE EMPLOYEE ENTITLED TO RECEIVE?**

For the ten-day sick pay, full-time employees receive up to 80 hours of paid sick leave. Part-time employees receive the average number of hours worked over a two-week period.

If the employee uses the leave of absence for items 1,2, and 3 in the above list, the paid sick leave act caps the benefit at \$511 per day, or \$5,110 if ten days are used. If the employee uses the leave of absence for items 4,5, or 6 in the above list, the benefit is capped at \$200 per day (\$2,000 in the aggregate).

The FMLA Expansion Act has higher limits. If the employee is unable to work or needs to work remotely because they need to care for a son or daughter because the child's school or place of care has been closed, the first 10 days of leave are unpaid. But, the rest of the days taken (up to 50, for 12-weeks total) must be paid at two-thirds the employee's regular rate of pay, up to \$200 per day and \$10,000 in the aggregate. The employee can elect to use any available, accrued vacation, sick leave, or other PTO during the first 10 days of unpaid leave.

## **IS THE EMPLOYEE WHO TAKES EXPANDED FMLA LEAVE ENTITLED TO REINSTATEMENT?**

Generally, yes. There may be an exception for employers with less than 25 employees.

## **CAN THE EMPLOYER REQUIRE THE EMPLOYEE TO USE EXISTING PAID TIME OFF INSTEAD OF THE MANDATED SICK PAY?**

No.

## **WHAT ABOUT UNION EMPLOYEES?**

The Acts do not differentiate between union and non-union employees. Therefore, these benefits apply to union employees unless the employer makes contributions to a multi-employer fund providing sick benefits. Otherwise, employers should notify unions of their intent to provide these enhanced benefits and allow the union to bargain over any discretionary aspect of the program.

## **HOW WILL EMPLOYERS PAY FOR THIS?**

First, the payments to the employees are not considered wages for payroll tax purposes. Next, the federal government will provide quarterly tax credits for these payments in the form of credits toward payroll taxes.

The mechanics of how the tax credit will apply is as follows. When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.

Under guidance that will be released next week, eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employees' share of Social Security and Medicare taxes, and the employers' share of Social Security and Medicare taxes with respect to all employees.

If the payroll taxes are not sufficient to cover the cost of qualified sick and childcare leave paid, employers will be able file a request for an accelerated payment from the IRS, which the IRS expects to process in two weeks or less. The details of this new, expedited procedure will be announced next week.

These tax credits and exemptions are designed to help employers meet the cost of the new mandated benefits. While substantial, they do leave open issues of cash flow that perhaps will be alleviated in additional pieces of legislation expected to follow.

For more information on how these Acts may affect you or your business contact the attorneys at Rock Fusco & Connelly, LLC. We can be reached via email at [info@rfclaw.com](mailto:info@rfclaw.com), or phone at (312) 494-1000.