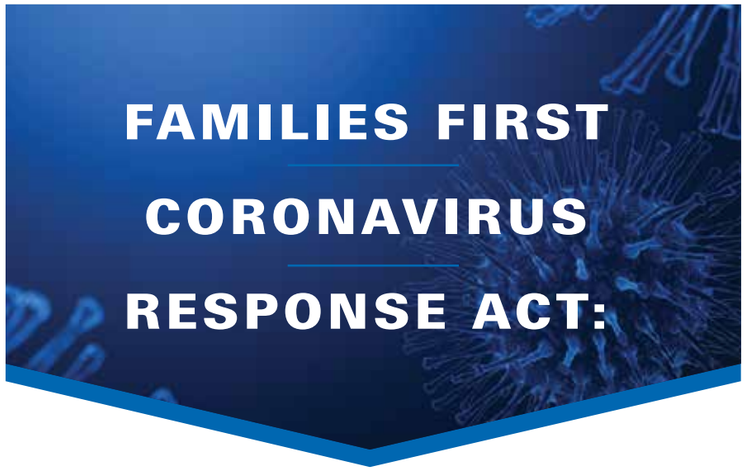

WHAT EMPLOYERS NEED TO KNOW

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (FFCRA). Among its provisions are two new paid leave laws that went into effect April 1 to assist employees negatively impacted by the rapid spread of the COVID-19 virus: the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Based on regulations and guidance issued by the Department of Labor, we have addressed several crucial questions about the new leave laws.

What employers are covered by the new laws?

Private employers with fewer than 500 employees and most public employers are covered. To determine employee counts, private employers must include full-time and part-time employees, employees on leave, temporary employees, and day laborers supplied by a temp agency. Only employees working in the United States are included. If there are affiliated entities, employers need to analyze whether they meet the joint employer or integrated employer tests to see which employees to include. While employers with fewer than 50 employees remain covered, they may be exempt from providing employees leave to care for children due to school or place of care closures or unavailability of child care provider due to COVID-19 if they can prove that providing this leave would jeopardize the viability of the business.

What employees are eligible for leave under the new law? Which may be exempted?

All employees (including part-time employees) are eligible for paid leave under the EPSLA, no matter how long they have been with their companies. To be eligible for leave under the EFMLEA, employees must have been employed for at least 30 days (with special rules applying to determine eligibility for employees recently released and rehired). Employers may elect to exempt from leave an employee who is a "health care provider" or "emergency responder." The definition of "health care provider" for this purpose includes anyone employed at a doctor's office, hospital, health care center, clinic or any other related facility, or who provides medical services, produces medical products or produces COVID-19 related medical equipment or supplies. Similarly, the definition of "emergency responder" is expansive and includes any employee necessary for the provision of transport, care, health care, comfort and nutrition to patients, or whose services are otherwise needed to limit the spread of COVID-19.

What leave is provided under the Acts?

The two leave laws provide very different benefits, but are designed to work together with respect to one type of leave. In particular, if the reason for leave is to care for a son or daughter whose school or daycare is closed or child care provider is unavailable, the first two weeks may be taken as paid under the EPSLA at 2/3 pay and then taken under the EFMLEA for up to ten more weeks at 2/3 pay (with a maximum under both laws of $200/day). Whether the first two weeks for this reason are taken as paid under the EPSLA is the employee's decision. If an employee does not elect to use EPSLA leave to get paid for those first two weeks, the first two weeks leave can be unpaid under the EFMLEA or the employee may be able to get paid through an employer-provided leave benefit.

The EPSLA provides additional reasons for an employee to receive paid leave that the EFMLEA does not. Under the EPSLA, an employee could take up to eighty hours of paid leave at the employee's regular rate of pay (up to a maximum of $511 per day) for one of these 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 health care provider to self-quarantine due to concerns related to COVID-19. (Note that in this case, "health care provider" is limited to a licensed doctor of medicine, nurse practitioner or other provider permitted to issue a certification under the FMLA.)
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

The EPSLA also allows an employee to take paid leave at 2/3 the employee's regular rate (up to a maximum of $200 per day) for one of these reasons:

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 his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19-related reasons. (Discussed previously.)
6. The employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services. (No such conditions have been specified as of the writing of this article.)

What about employees who can work from home?

To be eligible for leave under either of the new laws, the employee must be unable to work. If an employee can telework, the employee would not qualify for leave. Of course, if the employee becomes unable to work at home for one of the qualifying reasons, the employee would be entitled to the leave.

What about furloughed employees, or employees laid off because the business closed due to a government order?

Furloughed employees, or employees whose worksite has been closed, even if it is closed due to a government stay-at-home order, are not entitled to leave under the new laws. This is because the reason the employee is unable to work is not one of the qualifying reasons. Rather, the reason is that no work is available. Work must be available for the employee, and the employee must be able to perform the work "but for" the qualifying reason in order to be entitled to leave under the new laws.

What about employees not on leave who are coming to the worksite?

What precautions should employers be taking to maintain safety of the worksite? The Equal Employment Opportunity Commission (EEOC) has provided good guidance to employers, making it clear they can comply with recommendations from the Center for Disease Control (CDC) and the Occupational Safety and Health Administration (OSHA) for screening employees and protecting the workplace.

Some of the screening measures employers should consider to help maintain a safe worksite include the following:

- Asking employees about symptoms of COVID-19 and whether they have been in close contact (within six feet) of someone with a diagnosis or symptoms of COVID-19
- Taking employees' body temperatures
- Requiring employees with COVID-19 symptoms to stay home
- Requiring doctors' notes before returning to work

What responsibilities do employers still have under previously existing laws and regulations?

Non-discrimination laws still apply and measures for protecting confidential information remain a priority. Under the Americans with Disabilities Act (ADA), employers must store medical information, including information about COVID-19, separately from personnel records. Employers are not authorized to share the identity of employees with COVID-19 with other employees. Employers, however, are authorized to report the identity of employees with COVID-19 to public health agencies.

In addition to continued confidentiality requirements under the ADA, employers must still explore and provide reasonable accommodations to employees, whether they are in the workplace or working from home. Likewise, anti-harassment and anti-discrimination laws remain in full force. Employers are urged to communicate that fear of COVID-19 should not be misdirected based on presumptions about protected characteristics such as national origin, race or age.

As the world continues to adjust to the new realities created by the spread of COVID-19, there will be new guidance and new regulations passed to advise employers on how to continue business while also taking care of employees. Brooks Pierce's employment lawyers are available to answer questions, provide counsel, and help you make tough decisions as we all travel through uncharted territory together. ■

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