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Healthcare Employers and the Families First Coronavirus Response Act

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The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020 and becomes effective on April 2, 2020. As part of the FFCRA Congress enacted the Emergency Family and Medical Leave Expansion Act ("Expansion Act") and the Emergency Paid Sick Leave Act ("Sick Leave Act"). Sections I and II below summarize how the Expansion Act and the Sick Leave Act will apply to employers generally. Please contact your Holland & Hart attorney for specific questions relating to your workforce.

I. Healthcare Employer Exclusions

FFCRA includes three provisions addressing exclusions of interest to health care employers.

A. Exclusion of Health Care Providers and Emergency Responders

The Expansion Act and the Sick Leave Act include identical exclusions some employees of healthcare employers:

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions . . .

FFCRA does not provide further guidance about how an employer elects to exclude employees, such as whether an employer can exclude employees by position title or job category, instead of on an individual basis. The language quoted above apparently permits employers to exclude some providers on an individual basis, even if the employer does not intend to exclude all of that type of provider.

The Act incorporates by reference the definition of health care provider from the Family and Medical Leave Act and its regulations.¹ Thus, for the purposes of FFCRA, the following categories of health care providers can be excluded:

- Doctors of medicine or osteopathy;
- Podiatrists, dentists, clinical psychologists, optometrists and chiropractors when practicing within the scope of their practice;
- Nurse practitioners, nurse-midwives, clinical social workers and physician assistants when practicing within the scope of

their practice.²

The FFCRA does not provide a definition of emergency responder, but a generally accepted definition would include EMTs and paramedics.

Notably, nurses, nursing assistants, pharmacists and pharmacy techs, among other direct patient care providers, are not included in the definition of health care provider and cannot be excluded from the coverage of the Expansion Act or the Sick Leave Act.

It is also important to note that the definition borrowed by the FFCRA applies only when the provider is licensed to practice in the state where practicing and when practicing within the scope of their practice. As a result, there is some uncertainty about whether an employer can exclude a licensed provider who holds a position that does not involve the practice of the provider's discipline, such as, for example, a nurse practitioner who holds a managerial position and does not provide direct patient care.

B. Secretary of Labor Authority to Adopt Healthcare Exclusions

The Expansion Act and the Sick Leave Act both authorize, but do not require, the Secretary of Labor to exclude certain health care providers and emergency responders from the definition of employee under the Expansion Act, and under the Sick Leave Act, the Secretary can adopt a regulation authorizing employers of health care providers and emergency responders to “opt out.”

Hopefully, the Secretary will use his authority under these provisions to protect hospitals and other health care entities from the substantial impact that will occur if significant portions of the nursing staff elects to take leave. However, given the very short time frame before the FFCRA's effective date, employers should prepare staffing contingencies in the event the Secretary does not take action to prevent that outcome.

C. Secretary of Labor Authority to Adopt Small Employer Exemptions

The Secretary of Labor is also authorized to adopt regulations to exempt small businesses with fewer than 50 employees from the new requirements created by the Expansion Act and the Sick Leave Act if those requirements would jeopardize the viability of the business as a going concern. Smaller healthcare employers may benefit from such an exemption if the Secretary adopts regulations for smaller employers.

II. Emergency Family and Medical Leave Expansion Act

Summary

The Expansion Act expands the FMLA on a temporary basis and allows an eligible employee to take up to 12 weeks of job-protected leave to care for

the employee's child if the child's school or place of care is closed, or the childcare provider is unavailable, due to the COVID-19 public health emergency.

The first 10 days of leave may be unpaid, but the employee may elect to use any accrued vacation leave, personal leave, or medical or sick leave to cover some or all of the 10-day period. After the initial 10-day period, an employer must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled, limited to \$200 per day and \$10,000 total per employee.

Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken emergency FMLA to the same or equivalent position upon the return to work. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

The Expansion Act takes effect on April 2, 2020 and remains in effect until December 31, 2020.

Questions

1. Which employers are covered?

The Expansion Act covers all private sector employers with fewer than 500 employees. Also, the Expansion Act retains the FMLA's coverage of all political subdivisions of a state.

2. Who is eligible?

Eligible employees include individuals who have been employed by the employer for at least 30 calendar days and who meet the "qualifying need related to a public health emergency" defined below.

3. What is the qualifying need for emergency leave under the Act?

The qualifying need related to a public health emergency "means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter of such employee if the school or place of care has been closed or the child care provider of such son or daughter is unavailable due to a public health emergency." "Public health emergency" has been defined as "an emergency with respect to COVID-19 declared by a federal, state or local authority."

4. How do I calculate the rate of pay for a full-time employee?

After the initial 10-day unpaid period, the employer generally must

pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. The Act limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.

5. How do I calculate the rate of pay for a part-time employee?

Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking emergency FMLA under the Act. Employees who have worked for less than six months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

6. When does the Act take effect?

The Act takes effect on April 2, 2020 and remains in effect until December 31, 2020.

7. How does this impact our FMLA policies?

The Act expands the FMLA to include a new type of approved leave: public health emergency leave related to the COVID-19 pandemic. This leave is available to employees who must take leave to care for their minor children because the school or place of care for the children has been closed due to the COVID-19 public health emergency.

Unlike the FMLA coverage requirements for other types of leave (employers with 50 or more employees within a 75 mile radius), all employers with fewer than 500 employees must grant public health emergency leave to anyone who has been employed for at least 30 days. The usual FMLA requirements that an employee has been employed for at least 12 months and have worked 1,250 hours do not apply to public health emergency leave.

The structure of public health emergency leave is also significantly different than standard FMLA leave. While standard FMLA leave is unpaid, public health emergency leave is only unpaid for the first 10 days. During this first 10 days, an employee may choose to substitute paid time off they have accrued under the employer's policy, but the employer may not require the employee to use their paid leave. After that, the employer must provide paid leave for each day of leave taken under the Act. This paid leave is calculated at two-thirds the employee's regular rate of pay for the number of hours the employee would normally be scheduled to work but is capped at \$200 per day or \$10,000 in the aggregate.

The Act also creates certain exemptions and exceptions for small employers that would not normally be covered by the FMLA and allows employers of health care providers and emergency responders to exclude those employees from leave under the Act.

Among all of these departures from the standard FMLA, the bill

does retain some familiar features: employees must give as much notice as practicable if leave is foreseeable, employees must be restored to the positions they held at the commencement of their leave (with a possible exemption for small employers (25 or less employees) in certain circumstances), and the leave allotment is still 12 weeks leave in a 12-month period. This means that public emergency health leave should not be available once the employee has used up their 12 weeks of FMLA leave for any and all reasons within the measurement period.

8. How does this impact our paid leave/time off policies?

The Expansion Act impacts a covered employer's paid leave/time off policies only as to eligible employees with a qualifying need. In such a circumstance, an eligible employee has the right to take leave, regardless of what the employer's time off policy permits or requires. In addition, after the initial 10 days of leave taken under the Act, the employer must provide paid leave for each additional leave day taken under the Act, regardless of whether the employee has accrued PTO.

9. Does this override state law?

The Expansion Act will not “diminish the rights or benefits” provided by other federal, state, or local laws. If state law is more generous, employees are entitled to the benefits of the state law.

10. What if our policies are more generous than what is in this law?

The Expansion Act does not “diminish the rights or benefits” provided by existing employer policy. Existing employer policies that are more generous can still be in effect.

11. Is the Act retroactive?

No. Legislation does not apply retroactively absent clear evidence of congressional intent. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.”) The act provides an effective date of April 2, 2020 and a sunset date of December 31, 2020. It includes no provision calling for retroactive application.

III. The Emergency Paid Sick Leave Act

Summary

The Sick Leave Act requires employers with five hundred (500) or fewer employees to provide up to eighty (80) hours of paid emergency sick leave to qualified employees. In the following, we address common questions regarding the application of the Sick Leave Act.

Questions

1. Who is subject to the Sick Leave Act?

a. Employers:

- i. An employer is a public entity employer with one (1) or more employees, or a private employer with fewer than five hundred (500) employees.
- ii. Note, there is an exception to the Act for smaller employers with fewer than fifty (50) employees, where their businesses would be jeopardized if they are required to comply with the Act.

b. Employees:

- i. All employees, regardless of time worked with the employer.

2. What benefits does the Sick Leave Act provide for employees?

a. The Act requires employers to provide employees (all part time and fulltime employees) paid sick time to the extent that the employee is unable to work or telecommute due to a need for leave because one of the following conditions apply:

- i. Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- ii. Health care provider has advised employee to self-quarantine due to COVID -19 concerns;
- iii. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- iv. Employee is caring for someone subject to a quarantine order or advice from a physician to self-quarantine;
- v. Employee is caring for a son or daughter who school has been closed or childcare arrangements are no longer available due to COVID-19 precautions; or
- vi. Employee is experiencing a similar condition specified by the Secretary of Health and Human Services.

b. How much sick leave must an employer provide under Sick Leave Act:

- i. For full time employees: 80 hours
- ii. For part time employees: The number of hours the employee regularly works in a two-week period. If the employee's shift varies, then the employer may provide leave equal to the average number of hours the employee has worked in a two-week period over the last 6 months. If the employee is just starting work, then the employer may provide leave equal to what the employer expected the employee to work in a two-week period.

c. When are employees eligible for sick leave under the Sick Leave Act?

- i. Immediately. The act has no employee eligibility

restrictions or requirements.

- d. How is leave paid under the Sick Leave Act:
 - i. Employees are paid at their regular rate of pay.
 - ii. There are certain monetary limits depending on the reason for the leave:
 - 1. If employee is taking leave for one of the following reasons, he or she can receive up to \$510 per day, or \$5,110 in the aggregate for the period:
 - 1. Employee subject to a COVID-19 quarantine or isolation order;
 - 2. Health care provider has advised self-quarantine due to COVID -19 concerns;
 - 3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
 - 2. If the employee is taking leave for one of the following reasons, he or she can receive up to \$200 per day or \$2,000 in the aggregate, at a rate of 2/3rds of the employee's normal hourly rate of pay:
 - 1. The employee is caring for someone subject to a quarantine order or advice from a physician;
 - 2. Employee caring for a son or daughter who school has been closed or childcare arrangements became unavailable due to COVID-19 precautions; or
 - 3. Employee is experiencing a similar condition specified by the Secretary of Health and Human Services.
 - iii. Sick leave provided under the Sick Leave Act is not required to be paid out at the time an employee separates from the employer.
- e. Can sick leave provided under the Sick Leave Act be carried over from year to year?

No, leave under the act has no cash value and is not carried over.
- f. What is the duration of emergency sick leave under the Sick Leave Act available?

Sick leave is available until the shift immediately following the need for leave ends (i.e. the end of the COVID-19 emergency period).
- g. How long will sick leave under the Sick Leave Act be available?

Employees can use sick leave for the reasons defined under the Sick Leave Act beginning on the effective date of the Act, April 2, 2020, through the sunset date of the Act, December 31, 2020.

3. What options are available for employers under the Sick Leave Act?

- a. Can employers require employees to find shift replacement while they are on emergency sick leave?
No, the employer cannot impose any requirements (other than reasonable notice) on the employee's ability to take the leave.
- b. Can an employer require an employee to provide reasonable notice, or comply with reasonable notice procedures, in order to continue receiving paid sick leave under the Sick Leave Act?
Yes.
- c. Can an employer require an employee to use other forms of paid leave before using emergency sick leave under the Sick Leave Act?
No. An employer cannot require an employee to use any other type of leave provided by the employer prior to using sick leave under the Sick Leave Act. The employee always has the option to use leave under the Sick Leave Act for the reasons described in the Act before using leave under the employer's policy, even if the employer's leave is more beneficial. Leave under the Act does not reduce leave accrued under the employer's policies.
- d. Can the employer recoup any of the cost of the sick leave required under the Sick Leave Act?
Payroll tax credits are available under the Sick Leave Act for employers who provide sick leave in accordance with the act. Notably, employers will receive a 100% quarterly payroll tax credit for qualified sick leave wages paid by the employer pursuant to the act.

4. Are employers required to post notices under the Sick Leave Act?

Yes, and the Secretary of Labor is charged with issuing a model notice within 7 days (on or before March 26, 2020). This notice should be posted by the employer where the employer posts other required notices.

5. What penalties are associated with a failure to comply with the Sick Leave Act?

A failure to comply with the Act constitutes a violation of the Fair Labor Standards Act, and employers will face liability in accordance with violations of the FLSA.

6. Does the Sick Leave Act override state law?

The Sick Leave Act overrides applicable state laws only if a state law provides a lesser benefit than the Sick Leave Act. State laws

that provide greater benefits still apply.

7. If employers lay off or terminate employees now, or have already done so, will those employees be protected retroactively?

The Act does not act retroactively, so it should not impact employer lay off / furlough decisions that occur before April 2, 2020.

Please let us know how we can assist you with preparing to comply with the Expansion Act and the Sick Leave Act.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.

¹See 29 C.F.R. § 825.125

² The regulation also includes "[a]ny health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits."

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