COVID-19: FREQUENTLY ASKED QUESTIONS AND ANSWERS ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

As a follow-up to our March 18, 2020 legal update on the passage of the Families First Coronavirus Response Act, LightGabler provides the following "frequently asked questions and answers" that may be helpful in understanding the implications of the Act.

The President signed the Families First Coronavirus Response Act ("the Act") into law on March 18, 2020. The Act will go into effect on April 2, 2020 (15 days after it was signed by the President), and expires on December 31, 2020. The full Act can be found at https://www.congress.gov/bill/116th-congress/house-bill/6201/text.

The Act does not include all of the details that employers will need to fully navigate and implement this new law. We are expecting additional instructions...
Employers are encouraged to regularly check online resources, including LightGabler's website, for updates. Employers are also encouraged to contact our office with any questions about the most up-to-date information and implications to your specific business.

**EXPANSION OF FMLA**

**Which employers are affected by the expansion of FMLA under the Act?**
The Act applies to all employers with fewer than 500 employees. Employers with fewer than 50 employees are not excluded as they previously were under the original FMLA. Employers with more than 500 employees remain subject to the original FMLA, but will not receive the tax credits provided for businesses under this Act.

**Which employees qualify for the new FMLA leave?**
Any employee who has worked for the employer for at least 30 calendar days prior to the designated leave is eligible under the Act, provided they meet the requisite leave standards (see below).

**For what reasons can an employee take leave under the FMLA expansion?**
The employee can take the expanded FMLA leave for a “qualifying need related to a public health emergency”. Although the House of Representatives originally proposed a bill with a broad definition of what qualified under this definition, the final bill that was passed by the Senate and signed by the President defines “qualifying need related to a public health emergency” to include only a situation where an “employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age 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.” Thus, the FMLA expansion addresses child care due to COVID-19 school closures only.

**What qualifies as a closure due to a public health emergency?**
Under the Act, a qualifying closure is when a school or child care provider is closed due to a public health emergency, declared by federal, state or local authority. Under the Act, “school” is an elementary or secondary school, and “child care provider” means someone who receives compensation for providing child care services on a regular basis.

**Are any businesses excluded from the expanded FMLA?**
The Secretary of Labor has authority to issue regulations to exclude certain health care providers and emergency responders and to exempt small businesses with fewer than 50 employees when the imposition of such
requirements would “jeopardize the viability of the business as a going concern.” These exclusions are currently undefined, and no information has been provided about how a business would apply for or receive this exemption. At this time, we are awaiting additional guidance regarding which health care providers and emergency responders might be excluded, as well as how employers can apply for this exemption and how it will be evaluated.

**How long can the expanded FMLA last?**
A qualifying employee can take up to 12 weeks of leave.

**Does the employer have to pay for the expanded FMLA leave?**
The first 10 days are unpaid. Employees may elect to use any available accrued form of paid leave during those 10 days (including the additional grant of paid sick leave under Act, as discussed below). The employer is then required to pay the employee for the remaining portion of the leave at two-thirds of the employee’s regular rate for the number of hours the employee would otherwise be normally scheduled to work. Payments are capped at $200 per day and an aggregate of $10,000 per employee.

**Is this a job-protected leave?**
Employers that have 25 or more employees are required to reinstate the employee to the same or an equivalent position upon their return to work. Employers with less than 25 employees may be exempt from the reinstatement requirement if:

1. The employee’s prior position does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave;
2. The employer makes reasonable efforts to restore employee to an equivalent position; and
3. The employer makes reasonable efforts to contact the employee within the following year if an equivalent position becomes available. The following year period begins on the date on which the qualifying need related to a public health emergency concludes, or 12 weeks after the date the employee’s leave commences.

**Are there any other exclusions?**
An employer of a health care provider or emergency responder may elect to exclude the employee from the expanded FMLA provisions and require that the employee continue to work. This exclusion likely relates to a circumstance where the health care provider or emergency responder is needed for public health and welfare reasons. The employee would not be excluded if, for example, the employer simply did not want to pay for the expanded leave.

**Does the employer have to continue paying medical premiums?**
Since this is a job-protected FMLA leave, the employer would need to continue paying the employer’s usual portion of the employee’s medical premiums. The employer should provide clear written notice to employees of their continued
coverage and their obligation to pay their portion of the premium during their leave. The employer should clearly identify the deadline and how the premium should be paid to avoid any confusion during the employee’s leave.

Generally, if the employee does not pay their portion of the premium, the health coverage would cease and the employee could become eligible for COBRA. Given the unique situation presented by the novel coronavirus, employers are encouraged to use caution and explore other potential options before allowing an employee’s health insurance to lapse. The employer might want to consider paying the employee’s share, if they are able. There also may be some relief from the insurance carrier under the current circumstances. Employers should reach out to their insurance professional for guidance with group plans.

Is there a tax credit associated with this benefit? Employers will be able to receive a tax credit in each quarter which is equal to 100% of the leave benefits provided under this section.

Do employers have to provide notice of these benefits to employees? Yes, the Act requires that notice of these new benefits be provided to employees. That notice will be provided by the Department of Labor within seven days after the date of enactment, or March 25, 2020.

**EMERGENCY PAID SICK LEAVE**

Which employers are affected by the new sick leave portion of the Act? The Act applies to all employers with fewer than 500 employees.

What are the new Paid Sick Leave requirements? Employers with fewer than 500 employees must provide full-time employees with 80 hours of paid sick leave, or the part-time equivalent for part-time employees. This leave is in addition to any leave already provided by the employer, including paid sick leave provided under California’s sick leave requirements.

Which employees qualify for the new Paid Sick Leave? This provision does not identify a specific duration of employment and therefore appears to apply to all employees.

What reasons qualify for the employee’s use of Paid Sick Leave under the Act? The Paid Sick Leave under the Act applies when (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 professional to self-quarantine (i.e., not the employee’s own choice); (3) the employee is experiencing COVID-19 symptoms and seeking a medical diagnosis, (4) the
employee is caring for an individual who qualifies under (1) or (2); or (5) the employee is caring for a son or daughter where the school or child care provider has been closed for COVID-19 reasons.

How does the Paid Sick Leave work with other accrued sick or PTO time? State sick time runs separately, as does PTO, and the additional Paid Sick Leave is in addition to other accrued time. The Act says that an employer “may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time” granted under this provision.

What happens if the employer does not pay the additional Paid Sick Leave? There are a variety of penalties imposed on employers for the failure to pay minimum wage if these benefits are not paid, and unlawful termination if the employer terminates the employee in response to a request for these benefits.

Are there any exceptions to the new Paid Sick Leave requirements? There is no obligation for the employer to provide Paid Sick Leave for an employee who has been terminated, resigned, retired or otherwise separated from employment. Accordingly, as long as there is no retaliation against an employee requesting to use the benefits, if an employer is forced to lay people off or shut down completely for a business crisis, there would be seem to be no requirement to pay the Paid Sick Leave. If there is a layoff for business necessity, the employer also would not have to continue paying health insurance premiums. Employers are encouraged to consult with their insurance professionals regarding questions and events that might affect employees’ health insurance coverage.

The Secretary of Labor has authority to issue regulations to exclude heath care providers and emergency responders by allowing the employer to opt out, and to exempt small business under 50 employees from the sick time requirements when the requirements would jeopardize the viability of the business as a going concern. The Act does not specify how this exemption may be requested or granted, although upcoming regulations may further define this issue. An employer of a health care or emergency responder employee may exclude an employee from this section. This appears to give the employer the ability to deny the leave if the employee is still needed at work.

Are there tax credits with this Paid Sick Leave? Yes. Each quarter, employers can receive a tax credit of 100% of the wages paid to employees for Paid Sick Leave.

Do employers have to provide notice of these benefits to employees? Yes, the Act requires that notice of these new benefits be provided to employees. That notice will be provided by the Department of Labor within seven days after the date of enactment, or March 25, 2020.
For further questions or legal assistance with COVID-19 issues specific to your company, contact the employment attorneys at LightGabler.

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