

Coronavirus Action Alert #4 From The Ward Damon Employment & Labor Law Team:

The Senate has passed, and the President has now approved the **Families First Coronavirus Response Act** (“Act”), which **goes into effect on April 2, 2020**. We have summarized some of the more important provisions below, namely those that will immediately impact employers and employees.

Keep in mind that this is a very fluid situation, with Congress already discussing additional coronavirus relief-related legislation. The Ward Damon Employment & Labor Law Team continues to monitor the situation and will provide updates as new information becomes available.

EMERGENCY PAID SICK LEAVE ACT

Eligibility:

The Emergency Paid Sick Leave Act requires private employers with less than 500 employees and all government employers to provide two weeks (80 hours) of paid sick leave to full-time employees if they are unable to work (or telework) and:

- Are subject to a federal, state or local quarantine or isolation order related to COVID-19.
- Have been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Are experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- Are caring for an individual who is subject to a quarantine or isolation order or have been told to self-quarantine by a health care provider.
- Are caring for a son or daughter because the child’s school or place of care has been closed or the child’s childcare is unavailable due to COVID 19 precautions.
- Are experiencing any other substantially similar condition specified by the Secretary of the HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Paid sick leave must be made available to all employees, no matter how long they have been employed. While full-time employees are eligible for 80 hours of paid sick leave, part-time employees, who are also eligible, will receive pay equal to the average number of hours the employee works over a two-week period.

Pay:

Leave for the employee himself must be paid at the higher of: (1) the employee’s regular rate of pay; (2) federal minimum wage; or, (3) the local minimum wage. The Emergency Paid Sick Leave Act also provides for leave, paid at two-thirds the employee’s regular rate, if leave is taken to care for a family member or a child whose school is closed, or childcare provider is unavailable because of coronavirus.

There is a cap on the amount an employer is required to pay to employees receiving this Emergency Paid Sick Leave. These caps differ depending on whether the employee is receiving full wages or two-thirds wages. To this end, there is a cap of \$511 per day and an aggregate limit of \$5,110 for those receiving full wages (absences for an employee’s own illness or quarantine); however, for those employees required to be paid at a two-thirds rate

(absences to care for others or due to school closures), there is a \$200 cap per day, with \$2,000 aggregate.

The law sunsets on December 31, 2020 and all leave not used cannot be carried over into the following year.

Required Posting:

Employers will be required to post an approved notice regarding the Act; however, the Notice has not yet been made available.

Additional Items of Note:

Employers may require employees to follow their usual call-in procedures during this period.

Employers of health care providers or emergency responders may elect not to provide this leave to employees.

There is a prohibition on retaliating against any employee who takes leave in accordance with the new law. The Act makes violations of the Emergency Paid Sick Leave Act akin to violations of the minimum wage and unlawful termination provisions of the Fair Labor Standards Act (FLSA) and subjects employers who do not comply to the same penalties, including liquidated damages (double damages) and prevailing plaintiff attorneys' fees and costs.

Employers cannot require an employee to find a replacement before allowing the employee to take this paid sick time.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Eligibility:

The Emergency Family and Medical Leave Expansion Act ("E-FMLA") provides that employees of private employers with less than 500 employees and all government employees may take up to 12 weeks of job-protected leave for "a qualifying need related to a public health emergency" through December 31, 2020 under the Family and Medical Leave Act (FMLA). The law allows employers to exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement. Unlike the Emergency Paid Sick Leave, eligible employees must have been on the employer's payroll for 30 days, and the "qualifying need" is limited to circumstances where an employee is unable to work (or telework) for the following reasons:

- To comply with a recommendation or order to quarantine due to exposure to or symptoms of coronavirus.
- To care for a family member who is complying with a recommendation or order to quarantine due to exposure to or symptoms of coronavirus; or,

- To care for a son or daughter (under 18 years old) if the child's school or place of care has been closed, or the childcare provider is unavailable, due to a coronavirus.

For the purposes of this leave, the definition of "parent" is expanded to include foster and adoptive parents, stepparents, parents of a domestic partner, parental in-laws, guardians, and those who stand in loco parentis. The term "family member" includes a parent, spouse, and the employee's son or daughter under 18. Additionally, "family member" includes pregnant women, senior citizens and those with access or functional needs if they are also 1) the son or daughter of the employee; 2) a next of kin of the employee or a person for whom the employee is a next of kin; or 3) a grandparent or grandchild of the employee.

And of course, as with all provisions of the FMLA, the employer is prohibited from retaliating or interfering with the employees request for FMLA leave.

Unpaid and Paid Time:

The Act provides that the first 10 days of the requested leave shall be unpaid but allows an employee to substitute any accrued personal time off ("PTO"). However, the employer is prohibited from requiring that employees use their accrued PTO for this time. For many employees, that leave period will be paid as a result of the Emergency Paid Sick Time Act. After the initial 10 days, an employer must provide paid E-FMLA leave at a rate of two-third's the employee's usual rate of pay for the number of hours the employee would otherwise be scheduled to work. In no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.

Job-Protection:

E-FMLA leave is job-protected, meaning the employer must restore an employee to the same or equivalent position upon their return to work. However, the new law includes an exception to this requirement for employers with fewer than 25 employees if the employee's position no longer exists following leave due to economic conditions or other operational changes caused by a public health emergency during the period of the employee's leave. Specifically, an employer with less than 25 employees is not subject to the provisions requiring job restoration if:

- The employee takes leave as provided by the act.
- The position held by the employee when the leave commenced no longer exists 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.
- The employer made reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and,
- Despite reasonable efforts described above, the employer continued to make reasonable efforts to restore the employee to an equivalent position during the year following the date on which the qualifying need related to a public health emergency concludes or the date that is 12 weeks after the date on which the employee's leave commenced, whichever is earlier.

Tax Credits for Emergency Paid Sick Leave and Family and Medical Leave

The Act also provides for certain refundable tax credits for employers. Specifically, the Act provides:

- **Payroll Credit for Required Paid Sick Leave:** A refundable tax credit for employers equal to the amount that an employer pays in qualified sick leave wages up to \$511 for any day of absence for an employee's own illness or quarantine, or \$200 for any day of absence to care for others or due to school closures.
 - The Sick Leave Tax Credit is applied against the taxes imposed on the employer by section 3111(a) or 3221(a) of the Internal Revenue Code for each calendar quarter.
 - Total number of days taken into account for each quarterly Sick Leave Tax Credit is limited to 10 over the total number of days taken into account for all preceding calendar quarters.
 - The Sick Leave Tax Credit is capped at the total taxes imposed by Section 3111(a) and 3221(a) on the employer for that calendar quarter. Any excess is treated as an overpayment and will be refunded to the employer.
 - The Act allows for an increase in the Sick Leave Tax Credit for any qualified health expenses of an employer, i.e., the amounts paid by an employer to maintain a group health plan other than those expenses included as part of an employee's gross income.
 - Employers may elect to forego the Sick Leave Tax Credit and have this section not apply.
- **Payroll Credit for Required Paid Family Leave:** A refundable tax credit for employers equal to the amount of qualified family leave wages paid under the E-FMLA by an employer for each calendar quarter, up to \$200 per day for each employee that is paid family leave wages, and in the aggregate for all calendar quarters, \$10,000.
 - Just like the Sick Leave Tax Credit, the Family Leave Tax Credit is also applied against the taxes imposed on the employer by section 3111(a) or 3221(a) of the Internal Revenue Code for each calendar quarter and is capped at the total taxes imposed by those sections of the Internal Revenue Code. Any overpayments will be refunded to the employer.
 - The Family Leave Tax Credit may also be increased for any qualified health expenses paid by the employer that are allocable to the family leave wages paid by the employer.

For self-employed individuals, the Act also provides for similar refundable tax credits.

IN CONCLUSION:

We are all in this together and our team continues to monitor changes to this rapidly progressing response and will, of course, provide updates as needed.