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GOSS & LUCARELLI
ATTORNEYS AT LAW

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) SIGNED INTO LAW BY PRESIDENT TRUMP

March 19, 2020

On Wednesday, March 18, 2020, Congress passed a revised version of House Resolution 6201, known as the Families First Coronavirus Response Act (“FFCRA”), to address the impact of COVID-19 and provide economic relief to U.S. workers. President Trump signed the bill into law on Wednesday evening. The provisions described take effect on April 2, 2020 and terminate on December 31, 2020.

Within FFCRA, there are two acts impacting employers: Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act. FFCRA also creates new tax credits to offset the cost of paid leave and provides additional funding for the state unemployment compensation funds for a limited time period.

I. EMERGENCY PAID SICK LEAVE ACT

Employers with fewer than 500 employees are required to immediately provide short term paid sick time to all employees, regardless of how long they have been employed. Paid sick time must be provided to employees who cannot work (or telework) due to a need for leave because:

- (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.
- (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 a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such 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.

Employees of health care providers or emergency responders may elect to exclude such employee from paid sick time.

- Duration of paid sick time under FFCRA:
 - Full-time employees are entitled to 80 hours of paid sick time.
 - Part-time employees are entitled to the number of hours the employee works in a two-week period.
 - Does not carry over into the following year.
 - Terminates beginning with the employee's next scheduled work shift immediately following the need for paid sick time.
 - Employers are not required to pay out unused paid sick time upon separation.
- Wage for paid sick time:
 - Employees that take leave for their own quarantine/illness under reasons (1), (2) or (3) are entitled to be paid:
 - the greater of the employee's regular rate of pay, or
 - the applicable minimum wage rate under federal or state law, not to exceed \$511/day (\$5,110 in the aggregate).
 - Employees that take leave to care for another under reasons (4) and (5), or who are experiencing a substantially similar condition under reason (6), are entitled to be paid:
 - an amount equal to two-thirds (2/3) of the greater of the employee's regular rate of pay, or
 - the applicable minimum wage rate under federal or state law, not to exceed \$200/day (\$2,000 in the aggregate).
- Employers may not:
 - Require that employees use other paid sick leave prior to receiving FFCRA sick time.
 - Discriminate against employees that use FFCRA sick time.
 - Retaliate against an employee that makes a complaint under FFCRA, or participates in any proceeding under FFCRA.

Employers who fail to provide paid sick leave or terminate an employee for exercising leave rights will be subject to penalties under the Fair Labor Standards Act.

- Employers must post a notice of FFCRA's paid leave requirements in an area where employee notices are customarily posted. The Department of Labor (DOL) has until March 25, 2020 to issue a model notice.
- The Department of Labor is authorized to issue regulations as follows:
 - Excluding health care providers and emergency responders from the scope of employees entitled to paid sick leave.
 - Exempting small employers with fewer than 50 employees from the requirement to provide paid sick time to care for an employee's child due to school closure, when the imposition of this requirement would jeopardize the viability of the business.

There is currently no guidance on how small employers can request an exemption, or the criteria that will be considered in deciding whether to grant an exemption.

II. EMERGENCY FAMILY AND MEDICAL LEAVE ACT EXPANSION ACT

FFCRA creates new paid family leave benefits by amending the Family and Medical Leave Act (“FMLA”) to provide for a fifth qualifying condition. Under the FMLA, employers with 50 or more employees must provide 12 weeks of job protected unpaid medical leave for one of the following qualifying reasons:

- (1) birth of a child;
- (2) placement of a child for adoption or foster care;
- (3) an employee’s own serious health condition;
- (4) care for the employee’s spouse, child or parent who has a serious health condition;

FFCRA establishes a fifth qualifying condition for employees with fewer than 500 employees:

- (5) *for qualifying need related to a public health emergency.*

The term “*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 under 18 years of age of such employee if the school or place of care has been closed, or the child care providers of such son or daughter is unavailable, due to a public health emergency. “Public health emergency” has been defined as a COVID-19 emergency declared by a Federal, State or local authority.

A special carveout exists for employees of a health care provider or an emergency responder, who may elect to exclude such employees from the leave entitlements related to the public health emergency. The Secretary of Labor has the authority to issue additional regulations for good cause to:

- Exclude certain health providers and emergency responders from the definition of eligible employee; and
- 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.

Leave under FFCRA differs from traditional FMLA leave in several ways:

- Leave related to a public health emergency is available to employees that have been employed for *at least 30 calendar days*. By contrast, traditional FMLA leave is only available to employees that have been employed for at least 12 months.
- *All employers with fewer than 500 employees* must provide leave related to a public health emergency. This means that employers with fewer than 50 employees, who are not subject to FMLA, must provide 12 weeks of leave under FFCRA for a qualifying need related to a public health emergency.
- Leave under the FMLA is not required to be paid. Under FFCRA, qualifying need related to a public health emergency is partially paid as follows:
 - The first ten (10) days of an employee’s leave may be unpaid. An employee may elect to substitute accrued vacation leave, personal leave, medical or sick leave for unpaid leave during the initial 10-day period, but an employer *cannot require* substitution of paid leave.
 - If the leave is due to one of the 6 conditions under the Emergency Paid Sick Leave Act (see Section I above), employees would receive paid sick time based on their work schedule during the first 10 days.
 - After the first 10-day period, the employee must be paid not less than 2/3 of the employee’s regular rate of pay for the number of hours the employee would have

been normally scheduled to work, up to a maximum of \$200/day (\$10,000 in the aggregate).

- For employees whose schedules vary from week to week, pay is:
 - the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes leave, including hours for which the employee took leave of any type.
 - if the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day the employee would normally be scheduled to work.
- Employers with *25 or more employees*, must restore employee to the same or equivalent position who take leave because of a “public health emergency.” Employers with *25 or fewer employees*, job restoration is not required following leave if:
 - the position held by the employee prior to leave does not exist due to economic reasons or other changes in operating conditions of the employer that affect employment and are caused by the public health emergency;
 - the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment;
 - if reasonable efforts to restore the employee to an equivalent position fail, for one year following the employee’s leave, the employer must make reasonable efforts to contact the employee if an equivalent position becomes available.

III. EMPLOYER TAX CREDITS

To reduce the economic burden on employers for FFCRA’s new paid leave benefits FFCRA permits employers to take 100% of the qualified sick leave wages paid by the employer, as payroll tax credits, subject to certain limitations.

The tax credit for short term paid sick time is for wages up to \$511/day for the employee’s own sick leave, or \$200/day if the sick leave is to care for another individual. The tax credit for paid family leave is for wages up to \$200/day (\$10,000 maximum). Credits under FFCRA are not available to employers already receiving a credit for paid family and medical leave under the Tax Cuts and Jobs Act.

IV. BCGL RECOMMENDATIONS

Small to mid-size business should be prepared to implement these provisions and consider whether existing leave policies should be revised. BCGL’s Employment Team of Theresa Mongiovi (theresam@bcgl-law.com) and Angela Sanders (angelas@bcgl-law.com) are available to assist you with policy preparation, evaluation of workforce plans, and communicating with your employees. The BCGL team is available to answer any questions you may have about coronavirus strategies as it impacts your business.