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HOUSE PASSES FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

On Saturday, March 14, 2020, the House of Representatives passed 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. FFCRA is supported by President Trump and is expected to pass in the Senate this week. If passed as drafted, employers with fewer than 500 employees would be required to immediately provide short term paid sick leave to employees and will be eligible to receive tax credits.

PAID SICK LEAVE

Paid sick time required under FFCRA is in addition to any paid sick benefits an employer already offers.

- Required amount:
 - Full-time employees are entitled to 80 hours of paid sick leave, and
 - Part-time employees are entitled to the number of hours the employee works in a two-week period.

- Eligible reasons for paid sick leave:
 - To self-isolate because the employee is diagnosed with COVID-19;
 - To obtain a medical diagnosis or care if the employee is experiencing the symptoms of COVID-19;
 - To comply with a public official or a health care provider order or recommendation that the physical presence of the employee on the job would jeopardize the health of others due to COVID-19 exposure (quarantine);
 - To care for a family member who is self-isolating because the family member has been diagnosed with or is experiencing symptoms of COVID-19 and/or needs to obtain medical diagnosis or care;
 - To care for a family member if a public official or a health care provider determines that the presence of the family member in the community would jeopardize the health of others due to COVID-19 exposure (quarantine); and
 - To care for the child of such employee if the school or childcare has been closed due to COVID-19.

- Duration of paid sick leave:
 - Does not carry over into the following year and terminates upon the employee’s return to work following a period of leave for the reasons stated above or after December 31, 2020, whichever occurs first.

- Prohibitions:
 - Employers are not permitted to modify existing paid leave policies to avoid providing additional sick time.
 - Employers may not require that employees use other paid sick leave prior to sick leave provided under FFCRA.

PAID FAMILY AND MEDICAL LEAVE

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) to care for the employee’s spouse, child or parent who has a serious health condition;
- (5) *for leave “related to a public health emergency” (created by FFCRA).*

Leave related to a public health emergency covers the following: (1) leave to comply with a recommendation or order by a health care provider or public health official that the employee’s physical presence at work would jeopardize the health of others due to exposure or symptoms of COVID-19 (diagnosis of COVID-19 or quarantine); (2) to care for a family member who is under a COVID-19 recommendation or order; and (3) to care for a minor child if the child’s school or place of care has been closed, or the child’s care provider is unavailable.

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

1. Leave for public health emergencies is available only 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.
2. *All employers with fewer than 500 employees* must provide leave for public health emergencies. This means that employers with fewer than 50 employees, who are not subject to FMLA, must provide 12 weeks of leave for reasons related to the coronavirus.
3. Under FMLA, leave to care for a family member is limited to spouses, minor children and parents. FFCRA expands the definition of family member to include the *adult children, next of kin, grandchildren and grandparents of an employee*, provided the family member is either pregnant, a senior citizen, disabled, or has access or functional needs.
4. Under FFCRA, the first fourteen (14) days of an employee’s leave may be unpaid. An employee may elect to substitute accrued, paid leave during the initial 14-day period, but an employer *cannot require* substitute of paid leave. After the first 14-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*.
5. Job restoration:
 - For employers with *25 or more employees*, FFCRA requires that employees who take leave because of a public health emergency be restored to the same job or to an equivalent position that the employee held prior to the leave.
 - For employers with *25 or fewer employees*, job restoration is not required following leave if: (1) 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; (2) 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; and (3) if reasonable efforts to restore the employee to an equivalent position fail, for one year following the employee's leave, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available.

FFCRA grants the Department of Labor ("DOL") authority to exempt small businesses with fewer than 50 employees from the paid leave requirements if the DOL determines that requiring paid leave would jeopardize the viability of the business. At this stage, however, there is no guidance on how small employers could request an exemption, or the criteria the DOL would consider in deciding whether to grant an exemption. The leave benefits created under FFCRA terminate on December 31, 2020.

EMPLOYER TAX CREDITS

Under FFCRA's new paid leave benefits, as stated above, employers with fewer than 500 employees are entitled to fully paid leave for the first 14 days of a COVID-19 qualifying reason, and 2/3 pay for the remainder of the leave, up to 12 weeks. To reduce the economic burden of these benefits on employers, FFCRA permits employers to take 100% of the qualified sick leave wages paid by the employer, as text credits, subject to certain limitations.

The tax credit for short term paid sick leave 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 a family member or child. 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.

In addition to the tax credits provided in FFCRA, the Treasury Department is also considering regulatory options to assist employers with cash flow. On March 14, 2020, Treasury Secretary Steve Mnuchin issued a statement that employers will be able to use cash deposited with the IRS to pay sick leave wages. Additionally, for businesses that would not have sufficient taxes to draw from, the Treasury will use its regulatory authority to make advances to small businesses to cover such costs.

BCGL RECOMMENDATIONS

The Senate is expected to consider FFCRA this week and the bill could be passed into law as early as week's end. Small to mid-size business should be prepared to implement new paid leave policies and should evaluate the cost associated with these new benefits. BCGL's Employment Team of Theresa Mongiovi (theresam@bcgl-law.com or 717-945-5745) and Angela Sanders (angelas@bcgl-law.com) are available to assist you with policy preparation and communicating with your employees, and are available to answer any questions you may have about coronavirus strategies for the workplace.