

MARCH 20, 2020 | PUBLICATION

## Client Alert: How the Proposed Corona Response Law will Impact Employers

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On Saturday, the United States House of Representatives, in a bipartisan effort, passed an economic relief bill, H.R. 6201, Families First Coronavirus Response Act, which is expected to go to vote in the Senate early this week. Subject to Senate amendment and approval, the following provides a summary of how the current proposed bill would potentially impact employers if it were to pass as currently written.

### Proposed Family Medical Leave Act Changes

- The bill provides new leave available under the Family Medical Leave Act ("FMLA") through December 31, 2020.
- This leave has different definitions of Covered Employer and Eligible Employees.
  - A covered employer is defined as "fewer than 500 employees."
  - An eligible employee is defined as one who has been employed for "at least 30 calendar days by the employer." The 1250 hour and 50 employees within 75-miles requirements do not apply.
- This leave broadens the definition of "Parent" to include "biological, foster, or adoptive parent of the employee, stepparent of the employee, parent-in-law of the employee, a parent of a domestic partner of the employee, a legal guardian or other person who stood in loco parentis to an employee when the employee was a child."
- This leave has an alternate definition of "Family Member." In addition to the usual parent, spouse and son/daughter, it also now includes "[a]n individual who is a pregnant woman, senior citizen, individual with a disability, or has access or functional needs and who is (i) a son or daughter of the employee; (ii) a next of kin of the employee or a person for whom the employee is next of kin; or (iii) a grandparent or grandchild of the employee."
- Up to 12 weeks of leave is available when related to a public health emergency (i.e. emergency with respect to Coronavirus declared by a federal, state or local authority) for the following:

- To comply with the recommendation or order of a public official or health care provider because the (1) physical presence of the employee on the job would jeopardize the health of others because of (a) the employee's exposure to the Coronavirus or (b) the employee has symptoms of Coronavirus and (2) the employee is unable to both perform the functions of their position and comply with the recommendation or order.
- To care for a family member that a public official or health care provider has determined is a risk to the community because of the family member's exposure to Coronavirus or symptoms of Coronavirus.
- To care for a son/daughter under 18 if the child's elementary or secondary school is closed or their "child care provider" is unavailable.
  - Secondary school is any nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education (which would include middle and high schools).
  - Child care provider is defined as one who receives compensation for providing child care services on a regular basis. This includes any center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services that is licensed, regulated, or registered under state (i.e. licensed day care facility). It is unclear whether a private nanny or unlicensed in-home day care would fall under this provision, but given the broad definition of "child care services," it likely would.

- The bill is silent as to new documentation requirements, so it is unclear what, if any, certification process would be permissible.
- The initial 14 days of this leave shall be unpaid. However, during this time, employees have the option to substitute the paid sick leave described below, or any other available paid leave.
- Employers cannot mandate that employees substitute paid leave.
- After the initial 14 days, the employee is entitled to paid leave for the remainder of the 12 weeks.

- The paid leave is  $\frac{2}{3}$  of the employee's "regular rate" under the Fair Labor Standards Act multiplied by the number of hours the employee would normally be scheduled to work.
- If the employee's hours vary such that the employer is unable to determine with certainty the number of hours the employee would have worked, then the number of hours is determined by the average number of hours worked in the 6 months prior to the leave.

- If the need for leave is foreseeable, the employee must provide notice as soon as practicable.
- This leave is job protected and employers have a duty to return the employee to their position or an equivalent position.
- There is an exception applicable to employers with fewer than 25 employees.

- For such employers, there is no duty to return if the employee's position no longer exists because of economic conditions or operating changes caused by the public health emergency and the employer makes reasonable efforts to restore the employee to an equivalent position (pay, benefits and terms and conditions of employment) for a 1-year period (measured from the earlier of the date on which the qualifying need ends or 12 weeks after the employee's leave starts).
- Reasonable efforts include the duty to contact the employee when an equivalent position becomes available over this 1 year period.

- The Department of Labor ("DOL") will also have the authority to exclude certain health care providers and

emergency responders from the definition of eligible employee and to exempt certain small businesses, if it chooses to do so. There are currently no exemptions except as outlined above.

- The new FMLA provisions become effective 15 days after enactment. The DOL will publish a poster within 7 days that employers must post in the workplace.

### **Proposed New Paid Sick Leave Act**

- New requirement for employers to provide paid sick leave to employees through December 31, 2020.
- Employer is defined as engaged in commerce and having fewer than 500 employees.
- This applies to full-time and part-time employees. There is no minimum period of employment required for an employee to be eligible for this paid sick leave.
- An employee is entitled to paid sick leave for any of the following reasons:
  1. To self-isolate because of diagnosis of Coronavirus;
  2. Obtain medical diagnosis or care if employee has symptoms of Coronavirus;
  3. To comply with the recommendation or order of a public official or health care provider that the employee would jeopardize the health of others because of exposure to or symptoms of Coronavirus;
  4. To care for a family member who meets one of the above three reasons; or
  5. To care for a child of the employee if their school or place of care is closed or their child care provider is unavailable.
- Full-time employees are entitled to a total of 80 hours of paid leave.
- Part-time employees are entitled to leave equal to the number of hours the employee works on average over a two week period.
- This leave is in addition to any paid leave available to the employee pursuant to the employer's policies existing as of the day of enactment.
  - Employers cannot require that employees take leave available under existing policies first.
  - Employees can choose to take this statutory paid leave before using other available leave.
  - Employers cannot modify their paid leave policies after enactment to avoid compliance.
- Employers cannot require employees to find replacement employees to cover their absence.
- The paid leave is available in two different amounts, as follows:
  - If the paid leave is for the employee's own Coronavirus related issues, then the paid leave is the greater of the employee's regular rate or the applicable federal or state minimum wage.
  - If the paid leave is to care for a family member or because of school closure or lack of childcare, then the employee is entitled to not less than 2/3 of the greater of the employee's "regular rate" or the applicable federal or state minimum wage.
  - The regular rate of an employee is determined by dividing his or her total remuneration for employment in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. Although the "regular rate" is considered a rate per hour, it is not always the same as the employee's hourly rate because it includes "all remuneration for employment paid to, or on behalf of, the employee," including commissions, performance bonuses, and shift differentials, excepting only payments specifically excluded under the FLSA.
  - Certain exceptions to this general rule may apply, however, in cases of tipped employees, whose regular rate is the sum of their cash wage and the amount of their tip credit, and employees who receive bonuses and/or commissions that are paid at a future date. To the extent that an employer pays bonuses or commissions at a future date, rather than in the paycheck

corresponding to the workweek in which the amounts were earned, they should consult with counsel as to whether they need to supplement prior paid leave payments to account for these additional amounts.

- There is nothing in the bill referencing documentation. An employer should be able to require documentation to demonstrate medical facts to the extent it is feasible for the employee to obtain such documentation in light of the state of emergency.
- There is no duty to pay out unused paid sick leave upon termination.
- The employer can require reasonable notice conditions as to the use of the leave.
- The proposed act makes it unlawful to discharge, discipline or discriminate against any employee who takes paid sick leave or who files a complaint or testifies about an employer's violations.
- The DOL is required to provide regulations on the paid sick leave within 15 days of enactment.
- Employers also must post a DOL notice within 7 days after the enactment of the law. Violations of the paid leave requirement will be treated as a failure to pay minimum wage under the FLSA with the same penalties.

### **Proposed Tax Credits**

The bill would provide tax credits for employers to partially offset the cost of the expanded paid leave provisions. There are also equivalent tax credits for self-employed individuals who are affected.

- For employers, the bill provides for a tax credit (applied against the employer's share of Social Security taxes) equal to 100% of qualified paid sick or expanded FMLA leave wages paid by an employer.
  - The credit for payments under the paid sick leave provision would be for wages up to \$511 per day, or \$200 per day if the sick leave is to care for a family member or child following the child's school closing, in either case for a maximum of 10 days.
  - The FMLA leave credit would be for wages of up to \$200 per day per employee who is receiving paid leave under the extended FMLA provisions, with a maximum per employee of \$10,000.
- Self-employed individuals may qualify for a credit against their self-employment tax if they would otherwise have qualified for paid sick leave or expanded FMLA leave under the bill had they been an employee of an employer (other than themselves).
  - The credit for the "new" sick leave equivalent would be \$511 per day to care for the self-employed individual, or \$200 per day to care for a sick family member or child following a school closing. The daily amount would be reduced to the individual's average self-employment income amount if it is lesser than the limit that would otherwise apply. The credit applies for each day in which the individual is unable to provide work in his or her self-employed position, up to a maximum of 10 days. The credit is 100% of the daily limit, or 67% of that amount if the inability to work is to care for a sick family member or child following a school closing.
  - The credit under the expanded FMLA equivalent for self-employed individuals is the lesser of \$200 or their average self-employment income per day for which they cannot work, up to 50 days.
- All of these tax credits apply for periods ending on December 31, 2020. They are also refundable, meaning that the taxpayer can receive a refund if the credit exceeds the amount of taxes they would owe.
- The bill directs the IRS to issue guidance on what documentation will be required in order to claim the credit.
- The bill does NOT include a delayed filing date for tax returns or payroll tax relief, even though those

ideas had been proposed.

It is important for employers to be prepared as we anticipate that the bill, or some modified version of it, will pass in the Senate this week and will be signed by the President soon thereafter. We also expect the DOL to implement regulations interpreting these provisions. Your Shumaker team will continue to monitor developments, and is available to assist as needed with the many issues raised by the Coronavirus.

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