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## Client Alert: Coronavirus Amended Paid Sick Leave and Expanded FMLA Leave Signed into Law

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On March 18, 2020, the President signed the Families First Coronavirus Response Act into law. The new law requires most employers with fewer than 500 employees to provide expanded FMLA leave and paid sick leave for certain reasons associated with the Coronavirus. The law goes into effect no later than 15 days after enactment and will remain in place until the end of 2020. The final version of the law contains significant changes relative to the original House version detailed in Shumaker's Client Alert dated March 16, 2020. The final version of the law is summarized below.

### Expanded Family and Medical Leave

- New leave is available under the Family and Medical Leave Act ("FMLA") through December 31, 2020.
- This leave has specific 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.
- Up to 12 weeks of leave is available to only employees who are unable to work **or telework (i.e. work remotely)** due to a need for leave to care for a son or daughter of the employee under 18 years of age whose school or child care provider is unavailable, due to a public health emergency.
  - Public Health Emergency is defined as an emergency with respect to COVID-19 declared by Federal, State, or local authority.
  - 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.
  - School is defined as an elementary or secondary school.

- It is noteworthy that under the final version:
  - Leave is not available to employees who can work remotely (even if they have school-age children at home to take care of on account of school closures or the unavailability of a child care provider), although it is unclear who decides whether an employee “can” work remotely; and
  - The new law no longer provides FMLA leave as detailed in the previous bill for: i) the illness of the employee or a family member requiring care resulting from Coronavirus or risk of Coronavirus; or ii) to comply with the recommendation or order of a public official or health care provider because the physical presence of the employee on the job would jeopardize the health of others because of Coronavirus or symptoms of Coronavirus. Unpaid FMLA leave may still be available for these reasons under existing FMLA law to the extent the illness meets the definition of serious health condition
- The law is silent as to new documentation requirements, so it is unclear what, if any, certification process will be permissible.
- The initial 10 days of this leave shall be unpaid. However, during this time, employees have the option to substitute the new Paid Sick Leave, described below, or any other available paid leave. However, employers cannot mandate that employees substitute paid leave.
- After the initial 10 days, the employee is entitled to paid leave for the remainder of the 12 weeks.
  - The paid leave is not less than 2/3 of an 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 per day in the 6 months prior to the leave. If the employee did not work over such period, then the number of hours is the average hours per day that the employee would normally be scheduled to work.
  - Critically, the final version of the law clarifies that such paid leave is capped at \$200 per day and \$10,000 in the aggregate” per eligible employee.
- 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 a new exception applicable to employers with less 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) if an equivalent position becomes available within 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.
- An employer of an employee who is a “health care provider” or an emergency responder may elect to exclude such employee from the leave required under the expanded FMLA.
  - Only employees who meet the definition of a health care provider will qualify for this potential exemption.
  - Under the FMLA, a health care provider is defined as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State or any other person determined by the DOL to be capable of providing health care services
  - The FMLA regulations also specifically identify the following as a “health care provider”:
    - Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as

- demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; and
  - Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law.
- If your employee is not one of the occupations identified in the above list, contact counsel to determine whether your employee might qualify for the exemption. State laws and regulations might also apply.
- 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 (fewer than 50 employees) if the requirements would jeopardize the viability of the business as a going concern. There are currently no exemptions except as outlined above.
- The new FMLA provisions become effective no later than 15 days after enactment.

### Paid Sick Leave

- 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 if the employee is unable to work (or telework) for any of the following reasons:
  - (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 child care 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.
- 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.
- Paid sick time stops beginning with the employee’s next scheduled workshift immediately following termination of the need for paid sick time
- 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.

- The final version of the law removed prior language from the House version that prohibited employers from modifying or taking away pre-existing paid leave that the employer had in place prior to enactment. This might leave open the possibility that employers may be able to modify or take away pre-existing paid leave (consistent with their policies and applicable state law). However, doing so could be risky, especially in light of the fact that the law states that nothing in the Act shall be construed to diminish the rights or benefits that an employee is entitled to under any existing employer policy.
- 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 reasons number 1, 2 or 3, above, then the paid leave is the greater of the employee's "regular rate" or the applicable federal or state minimum wage up to a maximum benefit of \$511 per day and \$5,100 in the aggregate per employee.
  - If the paid leave is for reasons number 4, 5 or 6, above, 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 up to a maximum benefit of \$200 per day and \$2,000 in the aggregate per employee.
  - 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 Act referencing documentation. However, 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.
- It is 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.
- An employer of an employee who is a "health care provider" or an emergency responder may elect to exclude such employee from Paid Sick Leave.
  - Only employees who meet the FMLA's definition of a health care provider as specified above will qualify for this potential exemption. Contact counsel to address specific occupations.
- The Department of Labor ("DOL") will also have the authority to exclude certain health care providers and emergency responders from the Paid Sick Leave requirement and to exempt certain small businesses (fewer than 50 employees) from having to provide paid leave for reason number 5, above.
- The new paid sick leave provisions become effective no later than 15 days after enactment. The Secretary of Labor will publish a poster within 7 days after the date of enactment for employers to post.
- Violations of the paid leave requirement will be treated as a failure to pay minimum wage under the FLSA with the same penalties.

## Tax Credits:

The Act provides tax credits for employers to offset the cost of the Act's paid leave and family leave provisions. There are also equivalent tax credits for self-employed individuals who are affected. The tax credits apply to paid leave and family leave amounts that are paid under the Act, and the self-employed equivalents.

- For employers, the Act provides for a tax credit (applied against the employer's share of Social Security taxes) equal to 100% of qualified paid sick or expanded family leave wages paid by the employer, subject to the following rules and limitations:
  - 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 family leave credit would be for wages of up to \$200 per day per employee who is receiving paid leave under the extended family leave provisions, with a maximum per employee of \$10,000.
  - The credit is increased by the amount of the employer share of Medicare tax (the 1.45% tax) on the sick leave and family leave wages.
  - The credit is also increased by the amount of the "qualified health plan expenses" that are allocated to the sick and family leave wages paid under the Act. "Qualified health plan expenses" are amounts paid by the employer to maintain a group health plan, to the extent that those payments aren't treated as taxable income to the employee. The IRS will need to publish rules to govern how this allocation is calculated.
  - The sick leave and the family wages aren't subject to the employer share of Social Security taxes (the 6.2% tax).
  - These credits also apply to the employer's share of the railroad retirement tax, for employers who are subject to that tax.
- Self-employed individuals may qualify for a credit against their self-employment tax for periods in which they cannot work in an amount that is an equivalent of the sick leave or family leave they could have received under the Act had they been an employee. The credit is subject to similar terms and limitations:
  - The credit for the sick leave equivalent depends on whether the individual is unable to work due to caring for himself or herself, or is caring for another person:
    - If the individual is unable to work due to caring for him or herself, the equivalent is the lesser of \$511 per day or 100% of his or her average daily self-employment income.
    - If the individual is caring for another person, the equivalent is the lesser of \$200 or 67% of his or her average daily self-employment income.
  - The credit for the sick leave equivalent 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 under the family leave equivalent is the lesser of \$200 or 67% of their average daily self-employment income per day for which they cannot work, up to a maximum 50 days.
  - The average daily self-employment income is calculated as the individual's net earnings from self-employment for the year divided by 260.
  - 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 Act directs the IRS to issue guidance on what documentation will be required in order to claim the credit.

- The Act does NOT include a delayed filing date for tax returns or payroll tax relief, even though those ideas had been proposed. However, the Treasury Department did announce in Notice 2020-17 that the deadline for federal income tax payments, including self-employment taxes, for 2019 was being extended until July 15, 2020. The delayed payment due date also applies to the first estimated tax payment for 2020 that would otherwise be due on April 15, 2020. The maximum amount that may be delayed without interest or penalties is \$1 million for individuals and pass-through entities, or up to \$10 million for corporations.

#### Health Plan Coverage of COVID Testing:

The Act requires health insurance companies and self-insured employer group health plans to provide first dollar coverage for COVID diagnostic testing and for other items or services related to the diagnostic test or to evaluation of the individual's need for COVID diagnostic test. This coverage must be provided without any copayment, deductible or other employee cost-sharing requirements. Under recently issued IRS guidance, a high deductible health plan may provide first dollar coverage for COVID-19 testing (waiving any deductible or other cost-sharing) without adversely affecting the plan's status as a high deductible health plan and the covered employees' eligibility to use their health savings accounts.

#### Conclusion

Employers should immediately begin preparing to comply with these new laws. We expect the DOL and IRS 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.

If you have any questions, please contact:

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