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CLIENT ALERT

EMERGENCY FEDERAL PAID LEAVE LEGISLATION

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On March 18, 2020, Congress passed the Families First Coronavirus Response Act to provide workers impacted by COVID-19 with short-term additional benefits and paid leave. President Trump signed the legislation into law the same day.

The following is a summary of the key provisions employers need to be aware of related to the expanded Family Leave and Medical Leave Act of 1993 (FMLA) protections, emergency paid sick leave, and tax credits for employers.

EXPANDED FMLA PROTECTIONS

The legislation amends the FMLA by expanding employee's use and benefits to address the current public health emergency. The following are the key aspects of the FMLA related amendments:

- Applies to employers with fewer than 500 employees and public employers. However, the Secretary of Labor can by regulation exempt employers with fewer than 50 employees and health care providers such as hospitals and nursing home providers.
- Employees who have been working for the employer for at least 30 calendar days are eligible for the expanded benefits. Note that to be eligible for these special FMLA benefits an employee need not be employed by the Employer for 12 months or work 1,250 hours in the last 12 months, so employees not eligible for regular FMLA leave may still be eligible for COVID-19 FMLA benefits.
- Consistent with the current FMLA, employees are eligible for 12 weeks of leave, but the legislation expands permitted leave reasons to include leave necessary to care for the employee's son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of the son or daughter is unavailable due to a COVID-19 emergency declared by federal, state or local authorities.
- Covered employees are eligible for 12 weeks of FMLA leave. **The first 10 days are unpaid.** An employee may elect to use any available paid leave during the first 10 days but cannot be required to do so by the employer.
- After the first 10 days, and only with respect to employees on FMLA leave for COVID-19

related reasons above, employers are required to provide **paid leave not less than two-thirds of the employee's regular rate of pay, capped at \$200 per day and \$10,000 in the aggregate.**

- Employees on a part-time or irregular schedule are entitled pay based on the average number of hours the employee worked for the 6 months prior to taking leave. Employees who have worked for less than 6 months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.
- Generally, an employee's leave is job protected, but such protections are subject to additional limitations for employers with less than 25 employees.

The expanded FMLA leave entitlement are expected to go into effect on April 2, 2020 and expire on December 31, 2020. As noted above, the Secretary of Labor is authorized to issue regulations exempting employers from application of the law that are health care providers or emergency responders. Exemptions may be sought for employers with less than 50 employees if the expanded benefits would jeopardize the "economic viability" of the company. The criteria for such a determination will be determined after further regulation to be promulgated by the Department of Labor.

EMERGENCY PAID SICK LEAVE

The legislation provides new paid leave benefits for full-time and part-time employees. The key provisions are as follows:

- Applies to employers with fewer than 500 employees and public employers.
- All employees of covered employers are eligible, regardless of the employee's duration of employment. However, an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from receiving paid sick leave benefits under this new law.
- Employees are able to take paid sick leave for 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* subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns (**note that this particular reason is not limited to family members**);
 5. The employee is caring for their son or daughter because the school or place of care of the son or daughter has been closed, or the child care provider is unavailable due to COVID-19 precautions; or
 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.

- Full-time employees are entitled to **80 hours of paid leave**. Generally, part-time employees are entitled to the average number of hours the employee works over a 2-week period. Paid leave under this legislation does not carryover to 2021.
- Employers are required to pay employees at the following rates:
 - The employee's regular rate of pay if the sick leave is for reasons 1 through 3 above, **capped at \$511 per day and \$5,110 in the aggregate**.
 - Two-thirds the employee's regular rate of pay if leave the sick leave is for reasons 4 through 6 above, capped at **\$200 per day and \$2,000 in the aggregate**.

The emergency paid sick leave entitlements are expected to go into effect on April 2, 2020 and expire on December 31, 2020. Similar to the expanded FMLA entitlements, the Department of Labor is authorized to issue regulations exempting employers from application of the law that are health care providers or emergency responders and may grant exemptions to employers with less than 50 employees if the expanded benefits would jeopardize the "economic viability" of the company. Employers are required to post notice to employees of these rights. A model notice will be made available by the Department of Labor soon.

EMPLOYER TAX CREDITS

Employers required to provide emergency paid FMLA leave or emergency paid sick leave as described above are provided with tax credits against the employer portion of social security taxes. Employers will be reimbursed to the extent their cost providing the foregoing leave exceeds the taxes owed.

With respect to paid sick leave wages paid to employees, employers will be entitled to a refundable tax credit equal to 100% of the sick leave wages paid for each calendar quarter. The wages and corresponding credits are capped at \$511 per day (\$200 per day if the leave is for caring for another person per the statute) for up to 10 days per employee in each calendar quarter.

With respect to emergency paid FMLA leave, employers will be entitled to a refundable tax credit equal to 100% of the FMLA leave wages paid for each calendar quarter. Similarly, the wages and corresponding credits are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Employers that are not subject to the legislation above (e.g., employers with 500 or more employees) are not entitled to receive these credits.

This article is general in nature and does not constitute legal advice and could be subject to change based on regulations that may be issued clarifying the benefits and requirements of this new law. Readers with legal questions should consult the authors, Mark Opara (MOpara@sb-kc.com), Julie Parisi (JParisi@sb-kc.com) or John Vering (JVering@sb-kc.com), or any other shareholders in Seigfreid Bingham's Employment Law Group, including: John Neyens, Brenda Hamilton, Shannon Johnson, or your regular contact at Seigfreid Bingham at 816-421-4460.