

## ***Time for Employer Action: The Families First Coronavirus Response Act***

*March 19, 2020*

The United States Senate passed a modified version of H.R. 6201, the Families First Coronavirus Response Act (the “Act”), on March 18, 2020, and President Trump quickly signed the package into law. The Act continues to provide free coronavirus testing, enhanced unemployment insurance, expanded food security initiatives, increased federal Medicaid funding, tax credits to reimburse employers, and some paid leave, but the scope and benefits of the paid sick leave and expanded Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. (“FMLA”) laws are smaller than those originally proposed. The Act applies to employers with fewer than 500 employees but businesses with under 50 employees may be exempt. Even as modified, the Act is projected to provide over \$100 billion worth of aid. Below is a summary of key provisions in the Act that employers should be prepared to implement shortly:

A. Emergency Family and Medical Leave Expansion Act.

- Employer and Employee Eligibility

Beginning on the date the Emergency Family and Medical Leave Expansion Act takes effect and ending on December 31, 2020, employers with “fewer than 500 employees” are required to provide a new form of FMLA leave – known as public health emergency leave – for up to 12 weeks to employees who have been employed at least 30 calendar days. While this coverage seems broad, significant potential exclusions exist. The Act provides that certain employers, specifically health care provider and emergency responder employers, may elect to exclude an employee from eligibility for public health emergency FMLA leave. The Secretary of Labor also has authority to exclude certain health care providers and emergency responders from the definition of “eligible employee” and to exempt small businesses with fewer than 50 employees from the expanded leave requirements “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” Despite these exclusions, smaller employers who are not exempted will be subject to FMLA requirements for the first time and already covered employers will need to offer public health emergency FMLA leave to a much broader percentage of their workforce than is already covered by the current FMLA.

- Grounds for Leave

Public health emergency FMLA leave is available under the Act only for COVID-19 related child care or school interruptions. Specifically, leave must be provided when an employee is unable to work (or telework) due to the need to

care for their son or daughter, who is under 18 years of age, when their school or place of care for the child has been closed, or the child care provider for the child is unavailable due to a public health emergency. A “public health emergency” means an emergency with respect to COVID-19 declared by a Federal, State or local authority. Leave to care for an at-risk family member who is adhering to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus, which was included in the House version of the legislation, was removed from the final Act.

- Leave Payments

The first 10 working days during which an employee takes public health emergency FMLA leave may consist of unpaid leave, or an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave. After the initial 10 days of public health emergency FMLA leave, employers must pay employees up to 10 additional weeks at not less than two-thirds of an employee’s regular rate of pay, as determined under the Fair Labor Standards Act (“FLSA”), based upon the number of hours the employee would otherwise be scheduled to work. Paid leave is capped at \$200 per day and \$10,000 in the aggregate. In the case of an employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken leave, the Act provides a formula for employers to utilize.

- Notice, Restoration and Potential Liability

Employees only must provide the employer with such notice of leave “as is practicable.” While FMLA’s job protections are afforded to most employees who take public health emergency FMLA leave, limited restoration obligations apply to employers who employ fewer than 25 employees. The final Act provides that a small employer who is not otherwise subject to the FMLA (because it has not employed 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year), is not subject to a civil action by an employee for its failure to provide public health emergency FMLA leave. However, the Secretary of Labor may bring administrative action or an action for damages against the employer. This Act takes effect no later than 15 days after enactment.

## B. Emergency Paid Sick Leave Act.

- Employer and Employee Eligibility

As enacted, the Act generally requires employers with fewer than 500 employees and government employers to provide employees paid sick leave to the extent the employee is unable to work or telework due to one of six reasons. The Act gives the Secretary of Labor authority, however: a) to exclude employees of health care providers and emergency responders by allowing these employers to opt out, and b) to exempt small businesses with fewer than 50 employees from the requirement to provide paid sick time when an employee is caring for their son or daughter due to a school closing or child care provider unavailability due to COVID-19 precautions when “the imposition of such requirements would jeopardize the viability of the business as a going concern.” Paid sick leave must be provided by covered employers for the period when:

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 a quarantine or isolated order related to COVID-19 as described above;
  5. the employee is caring for their son or daughter when the child's school or place has been closed, or the childcare provider for the child is unavailable due to COVID-19 precautions;
  6. the employee is experiencing "any other substantially similar condition" specified by the Secretary of Labor.
- Leave Calculation

A full-time employee is entitled to 80 hours of paid sick time. A part-time employee is entitled to the number of hours that such employee works, on average, over a 2-week period. After the first workday (or portion thereof) that an employee received paid sick time under the Act, an employer may require the employee to follow "reasonable notice procedures" in order to continue receiving such paid sick time.

Paid sick leave due to quarantine or medical symptoms (reasons 1-3 above) is calculated based upon the greater of the employee's regular rate of pay (as determined under the FLSA) or the minimum wage in effect for such employee in the state or locality in which the employee is employed, whichever is greater. Paid sick leave shall not exceed, however, \$511 per day and \$5,100 in the aggregate for leave due to any of the first three reasons listed above (leave due to quarantine or medical symptoms). Paid sick leave to care for a son or daughter due to school or childcare closing (reasons 4-6 above) shall be two-thirds of the employee's regular rate of pay or the minimum wage in effect and no more than \$200 per day and \$2,000 in the aggregate. The Act includes a formula for varying schedule hours calculation.

To the extent an employer provides employees paid sick time other than emergency paid sick leave, the employer may not require an employee to utilize other paid leave before using emergency paid sick leave. Unused emergency paid sick leave is not required to be paid to an employee upon the employee's termination, resignation, retirement or other separation from employment.

Employees are eligible to use the Act's paid sick time without regard to how long they have been employed by the employer. Employees may not be required to search for a replacement employee to cover their absence during the hours they are using paid sick time. The Labor Secretary is required to issue guidelines to assist employers with calculating the amount of paid sick time no later than 15 days after enactment of the Act.

Not later than 7 days after enactment of this Act, the Secretary of Labor is to publish a model notice that employer must post informing employees of the Emergency Paid Sick Leave Act. An employer who violates the Act shall be treated as having failed to pay minimum wages in violation of the FLSA and shall be subject to the same penalties. Unlawful

termination of an employee for exercising their rights under the Act also is explicitly prohibited. This Act takes effect not later than 15 days after the date of enactment and expires on December 31, 2020.

### C. Tax Credits.

A refundable tax credit equal to 100 percent of qualified paid sick leave wages paid by an employer for each calendar quarter is made available pursuant to the Act. The tax credit is allowed against the tax imposed by section 3111(a) of 3221(a) of the Internal Revenue Code of 1986. Qualified sick leave wages are those required to be paid by the Act and the benefit available varies upon the amount paid and reason for the sick leave (which has associated statutory caps).

A refundable tax credit also is payable in an amount equal to 100 percent of qualified FMLA wages paid by an employer for each calendar quarter, subject to the statutory caps of \$200 per day and in the aggregate for all calendar quarters, \$10,000. This tax credit also is allowed against the employer portion of Social Security taxes. Employers may elect not to have the credit apply.

Finally, wages paid in the form of emergency paid sick leave or expanded FMLA will not be considered wages for purposes of the Social Security Act. Treasury regulations and requirements are anticipated.

Overall, many employers will be required to comply with significant but much less sweeping sick leave and expanded FMLA leave requirements than originally proposed. Eligible employees who previously did not have paid sick leave will be entitled to some income protection for up to ten days in the event of quarantine, COVID-19 symptoms or school/child care closings that are COVID-19 related, and many employees will be entitled to additional job protected leave and pay in the form of expanded FMLA coverage during the period that COVID-19 school/child-care closings continue. As they implement the Act, employers should take care to ensure continued compliance with existing wage and hour, leave, disability and discrimination/retaliation laws.

Hancock Daniel's [Labor and Employment team](#) is prepared to assist with any issues or questions related to the coronavirus and the Families First Coronavirus Response Act. Our [COVID-19 Taskforce](#) will advise and assist employers on all concerns arising from the pandemic.

*The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel & Johnson PC, is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel & Johnson PC be liable for any direct, indirect, or consequential damages resulting from the use of this material.*