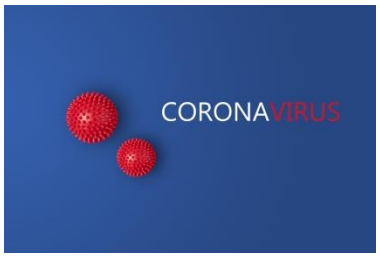
FAMILIES FIRST CORONAVIRUS RESPONSE ACT UPDATE



On March 18, 2020, the President signed into law the Families First Coronavirus Response Act (the "Act"). The Act takes effect "not later than" April 2, 2020 (i.e., immediately) and ends December 31, 2020. The Act contains two provisions requiring employers to provide additional benefits to employees who are forced to miss work "due to" the COVID-19 (coronavirus) pandemic:

1. The Emergency Paid Sick Leave Act, providing up to two weeks of fully paid time off (capped at $511 or $200 per day) to employees unable to work "due to" COVID-19; and

2. The Emergency Family Medical Leave Expansion Act, providing up to 12 weeks of two-thirds paid emergency leave (capped at $200 per day) to employees caring for children home "due to" COVID-19 closure of their school or child care facility.

These two provisions are discussed separately below.

Both provisions apply to all public employers and private employers with fewer than 500 employees. The U.S. Department of Labor may implement regulations to exempt employers with fewer than 50 employees from these provisions "when imposition of such requirements would jeopardize the validity of the business as a going concern." Unfortunately, at this time, it is not known if or how such exemptions will be applied. Employers of healthcare providers and emergency responders also have the right to exclude such employees from these leave requirements.

Employers required to pay leave under either provision of the Act will be entitled to refundable tax credits equal to 100% of the wages paid in accordance with the Act.

Please note, the Act does NOT apply to the many employees who are out of work as part of a group layoff or group unpaid leave due to a loss of business or office/plant closure, even though those events were caused by the financial effects of the COVID-19 pandemic. Those employees should qualify for unemployment insurance benefits.

THE EMERGENCY PAID SICK LEAVE ACT

Paid leave for self-care:

- **Who is eligible for paid leave?** Employers must provide all employees (regardless of length of service, full- and part-time) with two weeks of paid sick leave for the following reasons: (i) to comply with a government quarantine or isolation order related to COVID-19; (ii) to comply with the recommendation of a health-care provider to self-quarantine related to COVID-19; and (iii) to obtain medical care because the employee is symptomatic (employees could simply seek medical care for COVID-19 to qualify).

- **How many hours of leave?** A full-time employee is entitled to 2 weeks or 80 hours of paid sick leave. For part-time employees, the number of hours is based on the average number of hours they work over a two-week period. If the part-time employee works an irregular schedule, the number of hours is based upon the average number of hours per day over the prior six month period.

- **What is the rate of pay?** Leave is paid at the employees' "regular rate" of pay (as determined under the Fair Labor Standards Act considering wages, salary, non-discretionary bonuses, and commissions), or minimum wage, whichever is greater, and is capped at $511 per day.

Paid leave for care of others:

- **Who is eligible for paid leave?** All employees (regardless of length of service, full- and part-time) are entitled to paid leave, at a reduced rate, for the following reasons: (i) to care for an individual who is complying with a requirement or recommendation (by government or health-care provider) to quarantine or self-isolate; or (ii) to take care of an employee's child if the child's school or place of care has been closed due to COVID-19 (i.e., all school kids in Michigan).

- **How many hours of leave?** A full-time employee is entitled to 2 weeks or 80 hours of paid sick leave. For part-time employees, the number of hours is based on the average number of hours they work over a two-week period. If the part-time employee works an irregular schedule, the number of hours is based upon the average number of hours per day over the prior six month period.

- **What is the rate of pay?** Leave is paid at two-thirds the employees' "regular rate" of pay, or minimum wage, whichever is greater, and is capped at $200 per day.

Other requirements:

- The paid sick leave is in addition to any paid sick leave currently provided by employer policy.

- Employers may not require employees to use other types of leave available by law or company policy before using emergency paid sick leave.

- The paid sick leave will not carry over to the following year (the Act ends December 31, 2020).

- An employer may not change its current sick leave policy after enactment of the Act (to the detriment of employees).

- Employers must post notice of the requirements of the Emergency Paid Sick Leave Act in a conspicuous place (with the other employment law posters). The Secretary of Labor is to make a model notice publicly available within 7 days of enactment, presumably on the www.dol.gov website.

THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- **Who is eligible?** Any employee that has worked for the employer for at least 30 days (as opposed to one year under the regular FMLA) may take paid, job-protected emergency family leave to care for the employee's child (under the age of 18) if the child's school or place of care has been closed due to a public emergency, or if the child's care provider is unavailable as a direct result of COVID-19 (i.e., all school kids in Michigan).

- **How long is the leave?** Consistent with the FMLA, emergency family leave may extend up to 12 weeks. The first 10 days of leave may be unpaid, but an employee may elect to use accrued paid time off during this period. The employee may also request to receive 10 days of leave under the Emergency Paid Sick Leave Act discussed above during this period.

- **What is the rate of pay?** After 10 days, the employer must pay employees at two-thirds of the employee's "regular rate" of pay for the number of hours the employee would usually work, but capped at $200 per day. Employees with irregular schedules are entitled to be paid based on the average number of hours they have worked in the prior six months. Employees who have worked for less than six months are entitled to be paid based on the average number of hours the employee is normally scheduled to work.

This memo is intended only as a summary and general overview of the new Act as written. Further, the Act is, unfortunately, not entirely clear or well written. It may be substantially clarified by future regulation or practical application. If you have any questions or would like legal advice regarding the above provisions of the Act or any other employment issue, please contact David Lawrence **or** Sarah Gidley**.**