

Client Alert

Federal COVID-19 Relief Bill Imposing New Paid Leave Mandates and Providing Payroll Tax Relief Signed into Law

March 21, 2020

The Families First Coronavirus Response Act (H.R. 6201) (the "**Bill**"), passed by the U.S. House of Representatives late last week, was amended, passed by the U.S. Senate on March 18, 2020, and signed into law by the President within hours of its passage. Among other measures, the Bill imposes new paid sick leave obligations and expands the Family and Medical Leave Act ("**FMLA**") for medium and small private employers, whom will now need to promptly implement these requirements.

ONLY MEDIUM AND SMALL EMPLOYERS AFFECTED

The new paid leave provisions of the Bill only apply to private employers with *fewer than 500 employees* ("**Covered Employers**"), as well as to public agencies. The Bill, however, does not detail how the number of employees should be counted. For example, it is unclear whether all employees of an affiliated group of businesses should be aggregated for purposes of establishing who constitutes a Covered Employer under the Bill. This will need to be clarified through regulation.

EMERGENCY PAID SICK LEAVE ACT ("**EPSLA**")

Overview. The Bill temporarily (see "Effective Date and Sunset" below) introduces a new paid leave benefit, by requiring Covered Employers to provide their employees with coronavirus-related paid sick leave as follows:

- (1) at 100% of the employee's regular pay, up to \$511 per day and \$5,110 in the aggregate, if the employee is unable to work or telework due to (i) being subject to a federal, state, or local COVID-19 quarantine or isolation order, (ii) having been advised by a health care provider to self-quarantine because of COVID-19, or (iii) experiencing symptoms of COVID-19 and seeking a medical diagnosis; or

- (2) at 2/3 of the employee's regular pay, up to \$200 per day and \$2,000 in the aggregate, if the employee is unable to work or telework due to (i) caring for an individual who is subject to a COVID-19 quarantine order or who has been advised by a health care provider to self-quarantine because of COVID-19, (ii) caring for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19, or (iii) experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services.

The maximum length of EPSLA paid sick leave is (i) 2 weeks (80 hours) for full-time employees, and (ii) for part-time employees, the average number of hours that such employee works in a 2-week period. There is no minimum length of employment an employee must have in order to qualify for EPSLA leave — it is immediately available to all employees regardless of length of service.

Covered Employers are not required to pay out unused EPSLA paid sick leave upon termination of employment.

Coordination with Other Paid Leave Laws. The final Bill eliminates the requirement in the House version of the Bill that EPSLA paid sick leave be provided “in addition to” any paid leave already offered by the employer, but retains the rule that EPSLA paid sick leave will not “in any way diminish” employees’ rights or benefits under any existing employer policy or collective bargaining agreement, or under other federal, state or local laws. Further, employers may *not* require employees to use other paid leave before taking EPSLA paid sick leave. We interpret this to mean that the EPSLA paid sick leave is intended to coordinate with state and local paid sick leave laws to allow an employee to receive the *greater of* the benefits available under local, state or federal law, *without duplication of benefits* – but expect that this will be clarified through regulation.

Retaliation is Prohibited. Employers are prohibited from disciplining, terminating or otherwise retaliating against employees for taking, or asserting their right to, EPSLA paid sick leave.

Exceptions. EPSLA permits Covered Employers to withhold leave from employees who are health care providers or emergency responders, and also grants the Secretary of Labor the authority to grant additional limited exceptions through regulation.

Employer Notice. Covered Employers will further be required to post a notice informing employees of their rights to EPSLA leave. The Secretary of Labor has been directed to provide the language to be included in the notice.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT ("EFMLEA")

Overview. The Bill also temporarily (see "Effective Date and Sunset" below) expands FMLA by requiring Covered Employers to provide employees who have been employed for at least 30 days with the right to take up to *12 weeks of paid leave* if the employee is unable to work or telework due to the need to care for the employee's child under age 18 whose school or place of care is closed, or whose child care provider is unavailable, due to a COVID-19 emergency. (This is much narrower than the version of the Bill originally passed by the House, which extended FMLA leave for a number of additional COVID-19-related reasons.)

Broader Application than Other FMLA Provisions. Importantly, EFMLEA (unlike other FMLA provisions) is *not* limited to employees who work at an employer's location that has 50 employees within a 75-mile radius. Instead, EFMLEA (but not the other FMLA provisions) applies to all employees of employers with fewer than 500 employees (as well as of public agencies) who have worked for their employer for at least 30 calendar days.

Paid Leave. The initial 10 days of EFMLEA leave may be unpaid, but the remaining duration of the leave must be compensated at the rate of at least 2/3 of the employee's regular rate of pay, up to \$200 per day and \$10,000 in the aggregate. Employees may choose to use accrued personal or sick leave during the first 10 days.

Exceptions. The Bill permits Covered Employers to deny the EFMLEA leave to employees who are health care providers or emergency responders, and also grants the Secretary of Labor the authority to exclude (but does not automatically exclude) from coverage small businesses with fewer than 50 employees if the new leave requirements would jeopardize the viability of their continued business. Further regulations are expected regarding this.

Job-Protected Leave, with Small Employer Exception. A Covered Employer must generally restore an employee to their prior position (or an equivalent) upon the expiration of EFMLEA leave. However, Covered Employers with fewer than 25 employees are exempted from this requirement if an employee's position no longer exists due to economic conditions or other operational changes caused by a COVID-19 emergency, subject to certain additional conditions.

Union Employers May Comply by Contributing to Multiemployer Plan

Covered Employers that are party to a collective bargaining agreement may generally satisfy the leave requirements of the Bill (in lieu of paying wages as described above) by making contributions on behalf of each affected employee to the union's multiemployer

fund, plan or program that enables the employee to secure pay for EPSLA and EFMLEA leave.

EFFECTIVE DATE AND SUNSET

The requirements of the Bill (including entitlement to both EPSLA and EFMLEA leave) will go into effect not later than April 2, and will remain in effect until December 31, 2020.

PAYROLL TAX RELIEF FOR EMPLOYERS

The Bill intends to provide financial relief to Covered Employers (including self-employed individuals) that comply with the new leave requirements by providing them with a refundable tax credit against the employer portion of Social Security tax (6.2%) in an amount equal to *the sum of* (i) the wages they are required to pay for EPSLA and EFMLEA leave for each calendar quarter and (ii) the employer's expenses of maintaining a tax-qualified group health plan that are "properly allocable" to such paid leave wages (the Bill does not prescribe how this allocation should be calculated, but suggests a pro-rata allocation based on the number of covered employees and periods of coverage as one permissible method), and (iii) the amount of Medicare tax (1.45%) imposed on wages they are required to pay for EPSLA and EFMLEA leave. In addition, if the credit exceeds the employer's total Social Security wage tax liability for all employees for any calendar quarter, the excess credit is refundable to such employer.

Finally, the Bill exempts all wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act from the employer's portion of Social Security tax.

If you require any additional information about this Bill, please contact any of the attorneys listed below.

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Morrison Cohen LLP has also created the COVID-19 Resource Taskforce, a multidisciplinary taskforce comprised of attorneys with deep expertise in a broad range of legal areas, to assist clients navigating the challenging and uncertain business and legal environment caused by the COVID-19 pandemic. We encourage clients to utilize our capabilities by reaching out to their primary Morrison Cohen attorney contact, who will put you in touch with the appropriate Taskforce person. You may also reach out directly to Joe Moldovan and Alec Nealon, the Taskforce co-chairs:

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