GBS Compliance

Families First Coronavirus Response Act

The evolution of the COVID-19 epidemic is constantly evolving. The information in this document is based on what known at this time. As things change, we will continue to update you as it affects employee benefits compliance rules.

March 19, 2020

The **Families First Coronavirus Response Act** (Act) was passed by Congress March 18, 2020 and was signed by the President the same evening. Generally, the new law:

- Requires group health plans, health insurers, and government programs to provide free coronavirus testing
- Temporarily mandates emergency paid sick leave under specific conditions
- Expands Family and Medical Leave Act ("FMLA") protections to include paid and unpaid leave under specific conditions

The Act also:

- Appropriates $1 billion to states for unemployment insurance expansion.
- Increases Medicaid funding and addresses nutritional services for low-income Americans, particularly students who ordinarily receive subsidized meals at school.

Coronavirus Testing

Effective date: Effective from the date of enactment (March 18, 2020) until Health and Human Services (HHS) determines that the public health emergency has expired

Who: Applies to insured and self/level funded group health plans and health insurance issuers of group/individual health plans

- Includes grandfathered plans under the Affordable Care Act (ACA)
- Excludes excepted benefit plans

Requirements

- Must cover FDA-approved COVID-19 diagnostic testing products
  - This includes items and services furnished during a provider visit, e.g. office, telehealth, urgent care, and emergency room
- Must provide the coverage without any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements.

Additional Information

Government programs, such as Medicare, Medicare Advantage, Medicaid, CHIP, the Indian Health Services, Tricare, the Federal Employees Health Benefit Program, and the VA, must provide coverage for testing for COVID-19 without cost-sharing.

If States decide to provide coverage under Medicaid for testing without cost-sharing for uninsured persons, and the federal government will match 100% of the costs.

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Two Paid Leave Provisions: Quick Overview

What: There are two provisions under the ***Families First Coronavirus Response Act*** that address employee leave:

- The *Emergency Family and Medical Leave Expansion Act* which amends the Family and Medical Leave Act (FMLA)
- The *Emergency Paid Sick Leave Act*

Effective Date: Both provisions take "effect not later than 15 days after the date of enactment"

Who: Both sets of provisions apply to employers with fewer than 500 employees and, only for the Emergency Sick Leave provisions, includes government/public employers of any size.

How to calculate employer size is unclear:

- Under the FMLA Amendment provisions, employers can calculate based on number of employees for each working day in 20 or more workweeks in the current or preceding calendar year
- Under the Emergency Sick Leave provisions, provisions are silent on calculation methods
  - But it does state that government employers of any size must comply

Until regulators provide clarification, employers could consider erring on the conservative side and, if close to the threshold, decide to comply with the rule.

Requirements

- Employers must provide up to twelve (12) weeks of unpaid and paid leave under the (amended) Family and Medical Leave Act (FMLA) for certain employees unable to work in order to care for a child.
- Employers must provide up to 80 hours of emergency paid sick leave related to certain specified coronavirus events.

Tax Relief

To help (private, non-public) employers cover the cost of the required leave, the ***Families First Coronavirus Response Act*** provides a series of refundable tax credits that apply against the employer portion of Social Security taxes (i.e. 6.2%) or the hospital insurance taxes it paid on employees' wages each quarter through the end of 2020.

The credit is an amount equal to 100 percent of the "qualifying" paid leave wages paid by the employer

- For wages paid under the FMLA amendments, the credit cannot exceed $200 per day with an aggregate cap of $10,000 in a calendar quarter
  - A similar tax credit is allowed for certain self-employed individuals.
- For wages paid under the Emergency Paid Sick Leave Act, the credit is capped at $511 per day for days on which full pay is required and $200 per day for days on which 2/3 pay is required.

An additional credit is allowed for any "qualified health plan expenses" related to the paid leave provided.

A "qualified health plan expense" is defined as amounts "paid or incurred by the employer to provide and maintain a group health plan …, but only to the extent that such amounts are excluded from the gross income of the employees by reason of section 106(a)" of the Code. More information will be provided in upcoming regulations

The tax credits are effective between (1) a date that the Secretary of the Treasury must specify within 15 days after the date of enactment, and (2) December 31, 2020.

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Paid Leave Provisions (Part 1): FMLA Amendments

This section of the **Families First Coronavirus Response Act** is also referred to as *the Emergency Family and Medical Leave Expansion Act*. It amends the Family and Medical Leave Act (FMLA).

Effective Date: This leave applies no "later than 15 days after the date of enactment" which was March 18, 2020

Quick Summary

- Employers must provide up to twelve weeks of emergency unpaid and paid leave under the Family and Medical Leave Act (FMLA) for certain employees in order to care for a child.

Details

- The FMLA amendments allow certain employees to take 12 weeks of job-protected leave for a "qualifying need related to a public health emergency."
    - The first 10 days of leave may be unpaid leave
        - Employee may choose to substitute any accrued vacation, personal, or sick leave (under certain circumstances, this *could* include the emergency paid sick leave discussed below, but there is ambiguity in the law, which we expect will be clarified in upcoming regulations)
    - The remaining 12 weeks must be paid leave
        - Based on an amount not less than 2/3rds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work
        - Capped at $200 per day and $10,000 in the aggregate
- For employees whose schedule varies from week to week, they are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave
    - Employees who worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period.
- Employers who are part of a multiemployer collective bargaining agreement may make contributions to a multiemployer fund, plan, or program that provides paid leave based on hours worked under the agreement.
    - Clarification is expected in upcoming regulations.

Definitions

A "public health emergency"

- An emergency with respect to COVID-19 declared by a Federal, State, or local authority

A "qualifying need"

- Where an employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if:
    - the school or place of care has been closed, or
    - the childcare provider of such son or daughter is unavailable due to a "public health emergency."

Employee Qualifications

- Employees who have been employed for at least 30 calendar days
    - Note this is different than the usual 12-month period per existing FMLA rules.

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Employer Exceptions

- An employer who employees health care providers or an emergency responders is not required to provide this FMLA emergency leave to such employees.
- The DOL has the regulatory authority to exempt employers with fewer than 50 employees (employers that, under normal circumstances, are not subject to the FMLA) if the provision of paid FMLA leave "would jeopardize the viability of the business as a going concern."
  - More clarification on the exemption process is expected in upcoming regulations.
- Employers with fewer than 25 employees experiencing significant economic hardship are not required to reinstate employees after their FMLA leave period ends
  - However, the employer must make reasonable attempts to return the employee to an equivalent position and must make such efforts for up to a year following the employee's leave.
  - More clarification on how and when to show "significant economic hardship" is expected in upcoming regulations

Paid Leave Provisions (Part 2): Emergency Sick Leave

This section of the **Family First Coronavirus Response Act** is also referred to as the Emergency Paid Sick Leave Act.

Effective Date: This leave applies no "later than 15 days after the date of enactment" which was March 18, 2020.

Quick Summary

- For full-time employees
  - Employers must provide up to 80 hours *of emergency paid sick leave* related to specific coronavirus events.
- For part-time and Variable hour employees
  - Employers must provide "a number of *emergency paid sick leave* hours equal to the number of hours that such employee works, on average, over a 2-week period."
- The required paid leave ends with the employee's next scheduled work shift following the end of the qualifying need.
- It is unclear at the time of writing whether full-time is considered 40 hours per week or, for example, based on 30 hours per week under the Affordable Care Act (ACA). Until more clarification is provided, employers could consider erring on the conservative side and assuming 30 hours per week is full-time.

Employee Qualifications

This provision applies to any employee regardless of length of employment where employee:

- Is subject to a Federal, State, or local (required) quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Is caring for an individual who
  - (1) is subject to a Federal, State, or local quarantine or isolation order relate to COVID-19, or
  - (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is caring for a son or daughter if the child's school or place of care is closed, or the childcare provider is unavailable, due COVID-19 precaution
- 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.

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Note: *It is unclear whether emergency paid sick leave applies when an employee is caring for an individual who is experiencing symptoms of COVID-19, but who has not been advised by a health care provider to self-quarantine or ordered by the government to quarantine or self-isolate.*

Calculating Sick Leave

- If the leave is for the employees themselves, employees are entitled to their full regular rate of pay.
  - The maximum amount of required sick pay per employee is $511 per day and $5,110 in the aggregate.
- If the leave is to care for a family member or child, or for an employee experiencing "any other substantially similar condition," the required sick pay is based on 2/3rds of the regular rate of pay.
  - In this case, the maximum amount of required sick pay per employee is $200 per day and $2,000 in the aggregate.
- If the employee has a part time or variable schedule, employees are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave
  - Employees who worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period.
- Employers who are part of a multiemployer collective bargaining agreement may make contributions to a multiemployer fund, plan, or program that provides paid leave based on hours worked under the agreement.

An employee entitlement to paid sick time will end on the employee's next scheduled work shift after the need for leave ends. The DOL is expected to issue guidelines on calculating the payments.

The unused amount of emergency paid sick leave will not carry over from one year to the next and does not need to be paid out at the end of an individual's employment.

Employer Rules

An employer may not require an employee to first use other already accrued paid leave provided by the employer before using the new emergency paid sick leave.

- Note: There is some ambiguity on some of the finer details, the provisions included in the original House-passed version of the Act (before the House changed their own bill) stated that emergency paid sick leave must be in addition to any existing paid leave as of the date of enactment, and prohibited an employer from making any "change[s]" to its existing leave policy, but this was not included in the final version of the Act.
- It is not clear whether an employer can require an employee to use emergency paid sick leave during the first 10 days of emergency unpaid leave available under the FMLA amendments.
- More clarification is expected in upcoming regulations

An employer may not interfere with an employee's right to use emergency sick leave and may not "discharge, discipline, or in any other manner discriminate against" any employee who uses the emergency paid sick leave or who has filed a complaint based on the employer's failure to provide the requisite leave. Also, an employer may not require employees to find replacement employees to cover the hours they miss while using the paid sick time

- Employers who violate these rules may be violating the Fair Labor Standards Act, i.e. they may be liable to the employee for the emergency sick time that should have been provided, plus interest, an amount equal to the emergency paid sick time that should have been provided.

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An employer must post a Department of Labor (DOL) model notice which will be provided by the DOL within 7 days from enactment of the law.

Employer Exceptions

- Employers of health care providers and/or emergency responders may elect to exempt such employees
- The DOL can exempt small businesses with fewer than 50 employees when the imposition of the requirement would jeopardize the viability of the business as an ongoing concern.
    - More clarification on the exemption process is expected in upcoming regulations.

Revised March 23, 2020

This information is provided as educational material only and is not intended as legal, financial or tax advice. Consult your legal counsel for complete details on your compliance requirements for your plan(s).

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