

March 19, 2020

## Coronavirus Response Act Signed into Law

Late yesterday, the US Senate approved, and President Trump signed into law, the Families First Coronavirus Response Act (“Act”). The Act is an economic stimulus plan aimed at addressing the impact of COVID-19 on Americans.

The Act broadly provides employees with new and extended benefits, and employers with certain tax credits, in order to ease the burden imposed on the American workplace by the COVID-19 pandemic. The Act’s provisions include an emergency expansion of the Family Medical Leave Act (FMLA), a new federal paid sick leave law, and expanded unemployment insurance benefits.

### PAID & UNPAID LEAVE

#### Emergency Family & Medical Leave Benefits

**Expanded Coverage & Eligibility** – The Act significantly amends and expands the FMLA on a temporary basis through December 31, 2020. The threshold for coverage has been changed from employers with 50 or more employees to employers with **fewer than 500 employees**. The Act eliminates the requirement that an employee must have been employed for 12 months and worked at least 1,250 hours before being eligible for leave. The Act only requires an employee to have worked for the employer for at least 30 days to be eligible for leave.

**Reasons for FMLA Leave** – The Act permits any employee who is “**unable to report to work (or telework)** due to a need for leave” to take up to **12 weeks of paid, job-protected leave** to allow the employee to care for their child under 18 years of age if the school or place of care has been closed, or if the child’s care provider is unavailable due to a public health emergency, which is specifically defined as emergency with respect to COVID-19 as declared by a Federal, State or local authority.

**Paid Leave** – The Act provides that the first 10 days of Emergency FMLA may be unpaid; however an employee may elect to substitute any accrued paid time off, including vacation or sick leave, to cover some or all of the 10-day unpaid period. After the 10-day period, the employer must pay full-time employees **at two-thirds the employee’s regular rate** as determined under the Fair Labor Standards Act for the number of hours the employee would otherwise be normally scheduled. Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA. The Act limits the amount of paid leave to no more than \$200 per day and \$10,000 per employee in the aggregate.

**Small Business & Other Exemptions** – The Act gives the Secretary of Labor the authority to issue regulations to exempt some small business with **fewer than 50 employees** (when the imposition of such requirements would jeopardize the viability of the business). The Act also exempts employers with **fewer than 25 employees** from having to restore to employment an employee returning from leave if the employee’s former position has been eliminated due to the public health emergency, and the employer has made a reasonable effort to restore the employee to an equivalent position, which has failed, and the employer makes reasonable efforts to contact the employee for a period of one (1) year if an equivalent position becomes available. The Act also permits an employer of health care professionals or emergency responders to elect to exclude those employees from the expanded FMLA benefits under the Act.

**Effective Date & Expiration** – The FMLA provisions of the Act will take effect no later than 15 days following enactment.

### **Emergency Paid Sick Leave**

The Act requires covered employers to provide employees who are unable to work (or telework) with paid sick leave benefits. Full-time employees (regardless of the employee’s duration of employment prior to leave) are entitled to **80 hours of paid sick leave**, while part-time employees are provided with a number of paid sick leave hours equal to the number of hours that the employee works on average, over a 2-week period. The Act also permits an employer of health care professionals or emergency responders to elect to exclude those employees from the Paid Sick Leave benefits under the Act, and it also gives the Secretary of Labor the authority to issue regulations to exempt some small business with **fewer than 50 employees** (when the imposition of such requirements would jeopardize the viability of the business as a going concern).

**Reasons For Paid Sick Leave** – An employee can use paid sick leave if the employee is unable to work (or telework) because: (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 an order of isolation or quarantine or who has been advised by a health care provider to self-quarantine; (5) the employee is caring for their son or daughter because the child’s school or place of care has been closed, or the child’s 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.

**Limitations & Prohibitions:** The Act provides that in no event shall paid sick time exceed \$511 per day and \$5,110 per employee in the aggregate for a use described in Nos. 1, 2 and 3 above, and \$200 per day and \$2,000 in the aggregate for use described in Nos. 4, 5 and 6 above. Paid sick leave under the Act does not carryover from year to year, and employers are not required to cash out any unused

portion of the paid sick leave at the time of separation from employment. Employers are prohibited from requiring an employee to find a replacement before taking paid sick leave and prohibited from requiring an employee to use other paid leave first.

**Notice Requirements:** Employers are required to conspicuously post and keep posted a notice of the paid sick leave provided by the Act in a form and format to be prepared and approved by the Secretary of Labor.

**Effective Date & Expiration** – The Paid Sick Leave provisions of the Act will take effect no later than 15 days following enactment and will expire on December 31, 2020.

## **UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS**

This section of the Act provides \$1 billion during the 2020 calendar year for emergency grants to states for activities related to processing and paying unemployment insurance (UI) benefits, under certain conditions.

\$500 million will be used to provide immediate additional funding to all states for staffing, technology, systems and other administrative costs, so long as they meet basic requirements about ensuring access to earned benefits for eligible workers. Those requirements are:

- Require employers to provide notification of potential UI eligibility to laid-off workers;
- Ensure that workers have at least two ways (for example, online and phone) to apply for benefits;
- Notify applicants when an application is received and being processed and if the application cannot be processed, provide information to the applicant about how to ensure successful processing.

The funding would be distributed in the same proportions as regular UI administrative funding provided through annual appropriations.

\$500 million would be reserved for emergency grants to states which experienced at least a 10 percent increase in unemployment. These states would be eligible to receive an additional grant, in the same amount as the initial grant, to assist with costs related to the unemployment spike. States would also be required to take steps to temporarily ease eligibility requirements for UI benefits during the COVID-19 outbreak such as work search requirements, required waiting periods and requirements to increase employer UI taxes if they have high layoff rates.

This provision of the Act is effective upon enactment and will remain in effect until December 31, 2020.

## **TAX CREDITS FOR PAID SICK AND PAID FAMILY AND MEDICAL LEAVE**

The Act provides a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above, including self-employed individuals. These credits are only available to employers that are required to offer benefits under the Act, and they do not extend generally to employers not subject to the new mandates under the Act. The tax credits are allowed against the tax imposed by Internal Revenue Code Section 3111(a), which deals with the employer portion of Social Security taxes. Employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they otherwise owe.

## **THE ROAD AHEAD**

The Act raises unanswered issues for employers. For instance, the Act does not define “health care professional” or “emergency responder.” Nor does the Act define “full time” employment or explain how employers are to calculate the number of employees for the purpose of applying the 25, 50 and 500 employee thresholds. Guidance will likely be provided by the existing provisions of the FMLA and/or the FLSA, and by the Secretary of Labor through regulation.

Furthermore, the US Senate has vowed to turn its attention to broader economic relief measures, which may include suspension or reduction in the payroll tax. Still others have called for relief for specific industries such as travel, lodging, restaurants and retail establishments, which have been seriously impacted by the pandemic. Schenck Price will continue to monitor developments at federal, state and local level and continue to report on any new developments.

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