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ALERT

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HOW TO COMPLY WITH THE COVID-19 PAID LEAVE AND FMLA PROVISIONS

The Families First Coronavirus Response Act (Act) was signed into law on March 18, 2020. Employers are primarily impacted by the paid sick leave, expanded FMLA leave, and tax credit. The Act is broken down into two pertinent parts, one pertaining to the Emergency Paid Sick Leave Act, and the other pertaining to the Emergency Family and Medical Leave Expansion Act. This paper combines the two Acts and is designed to offer what hopefully will be a simpler and concise overview of compliance requirements.

Which Employers Must Comply with the Expanded FMLA Requirements?

Normally FMLA leave is available only to those eligible employees who work for an employer with 50 or more employees within a 75-mile radius. The Act changes these requirements for COVID-19 virus-related child care leave situations (described below) to employers with fewer than 500 employees. There are at least two exceptions to this expanded coverage. First, the U.S. Department of Labor has authority to issue regulations for good cause that will exempt a small business with fewer than 50 employees if imposing the new child care leave requirements would "jeopardize the viability of the business as a going concern." Second, the job restoration provisions of the COVID-19-related child care leave have special provisions for an employer with fewer than 25 employees.

How Are the Normal FMLA Leave Provisions Expanded for Child Care Leave Situations?

Traditionally, the FMLA provided qualified employees with up to 12 weeks of unpaid leave per year for the birth or adoption of a child, the caring for a spouse or an immediate family member with a serious health condition, or for an employee's own serious health condition. The Act expands the normal FMLA provisions to allow eligible employees to take FMLA leave if the employee is unable to work (or telework) due to a need for leave to care for a 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 the COVID-19 emergency.

How Much Notice for Such Expanded FMLA Leave Must the Employee Provide?

Normally, eligible employees who want to take FMLA leave must give the employer 30-days advance notice when the need for leave is foreseeable. The Act provides in reference to the

COVID-19 virus, where the necessity for leave is foreseeable, the employee shall provide the employer with such notice of leave as is practicable.

How Much Documentation Can the Employer Require for the COVID-19-Related Leave?

Under normal FMLA provisions, employers may request an employee to furnish medical certification for the need for leave at the time the employee gives notice of the need for leave or within five (5) business days thereafter, but the employer may request certification at some later date if it has reason to question the appropriateness of the leave or its duration. The employee must normally return the complete certification within 15 days of the request, unless doing so is not practical. There are specific government forms available for the employee's serious health condition and for a family member's serious health condition, WH-380E and WH-380F, respectively. It is likely that the government will require these forms to be used for COVID-19-related purposes, and may issue a new form to address the expansion for child care leave situations. Note that the Center for Disease Control (CDC) has suggested that healthcare providers may be overwhelmed with requests for such documentation, and so employer liberality is suggested.

Can the Employer Require a Return to Work Certification for Virus-Related Absences?

Employers can require employees to provide a return to work certification prior to returning from leave due to the employee's own serious health condition, provided that certification is uniformly required from all similarly-situated employees. It should be noted that the normal FMLA rules state that if the employer will require fitness-for-duty certification prior to restoring an employee to employment, it must provide the employee notice of the requirement with the FMLA-required designation notice. There is a government form that is supposed to be used for these purposes, WH-382, and it is likely the government will assert these requirements in the case of COVID-19 absences.

What Are the Paid Leave Requirements?

The Act as finally passed provides two weeks of fully-paid sick leave (up to \$511/day and \$5,110 in the aggregate) for each employee's own COVID-19 related government ordered, or health care provider recommended, isolation or quarantine or absence due to seeking a medical diagnosis for COVID-19 symptoms. Two weeks of paid sick leave (up to \$200/day and \$2,000 in the aggregate) is available to the employee who is caring for (1) an individual (not defined in the Act) who is subject to government ordered, or health care provider recommended, isolation or quarantine; or (2) the son or daughter of the employee if the school or place of care has been closed due to COVID-19 precautions. Full time employees would be paid for 80 hours and part-time employees would be paid based upon their typical hours in a 2-week period. Paid sick leave under this provision is made available in addition to any existing paid sick leave policies of the employer. An employer may not require that the employee use other paid leave provided by the employer for use during this paid sick time.

After the two weeks of paid leave under the above provisions, if an employee is caring for a child whose school or daycare has been shut, the employee will be entitled to two-thirds of the employee's regular rate of pay for up to the remaining 10 weeks of FMLA leave. In other words, an employee that has been in quarantine or caring for a family member affected by the virus will not be eligible for the additional 10 weeks of paid leave. The Act provides that in no event shall such paid leave exceed \$200.00 per day and \$10,000.00 in the aggregate.

When Are Employees Eligible for the Expanded FMLA Leave and for Paid Leave?

The use of the two weeks of paid sick leave under the Act will be available for immediate use by the employee regardless of how long the employee has been employed by the employer. Expanded FMLA leave is only available to employees who have been employed for 30 days.

What is the Effective Date of this Law and How Long Does it Remain in Effect?

The effective date of the Act is April 2, 2020, and the requirements will expire on December 31, 2020.

Further Changes or Amendments Likely and Will There Be Any Relief for Small Business?

Further changes are very likely. The most likely candidate for change is to expand the application of the Act to larger employers, as the Act is currently limited to employers of less than 500 employees. Another likely change is further relief for small business. Further, numerous regulations will have to be issued as well as clarifications. Announcements are being issued virtually daily, and so this Alert is being offered only to give an overview as to where things seem to stand as of this date.

How Will This New Act Be Enforced?

The Act will be enforced under the wage/hour laws, similar to investigations and litigation on minimum wage and overtime disputes.

Attached is the Act. Wimberly and Lawson is available to provide updates and consultation on the various issues, and so feel free to contact any of the attorneys listed below. Getting the most current advice is strongly suggested, as varying announcements are coming out almost daily on the issues.

Questions? Need more information? Call Larry Stine (jls@wimlaw.com), Jim Wimberly (jww@wimlaw.com), Kathleen Jennings (kjj@wimlaw.com) or Jim Hughes (jlh@wimlaw.com) at 404-365-0900.

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