U.S. Congress Passes Families First Coronavirus Response Act
Impacting Employer Obligations in Light of Public Health Emergency

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On Wednesday, March 18, 2020, federal legislators passed the Families First Coronavirus Response Act (the “Act”). The purpose of the Act is to make emergency fiscal appropriations in response to the widespread repercussions of the novel coronavirus and its related coronavirus disease (COVID-19). The Act will take effect on April 2, 2020, fifteen days after its passing, and will expire on December 31, 2020.

Divisions C and E of the Act apply to employers with fewer than 500 employees and, while the Act provides authority for the Secretary of Labor to subsequently exempt certain healthcare providers, first responders, and small businesses with fewer than 50 employees whose business would be jeopardized, no such exemptions are yet in effect.

Emergency Family and Medical Leave Expansion

Division C of the Act amends the federal Family and Medical Leave Act (“FMLA”) by extending qualifying reasons for leave under the FMLA to include the following specific reasons related to the COVID-19 pandemic:

1. To comply with a recommendation or order by a health authority or a health care provider that the physical presence of the employee on the job would jeopardize the health of others because of exposure to, or exhibition of symptoms of, COVID-19 by the employee, and the employee is unable to both perform the functions of the job and comply with the recommendation or order.

2. To care for a family member where a health authority or a healthcare provider makes a determination that the presence of the family member in the community would jeopardize the health of others in the community because of exposure to, or exhibition of symptoms of, COVID-19 by the family member.

3. To care for a child under 18 years old whose elementary or secondary school or place of care has been closed, or whose childcare provider is unavailable, due to the COVID-19 public health emergency.

Critically, the Act allows the first two weeks of the 12-week leave period to be unpaid, then requires employers to pay for the remainder of the leave at a reduced rate equal to no less than two-thirds of the employee’s regular rate of pay. Pay under this portion of the Act is capped at $200 per day or $10,000 total.

These provisions will apply to employees who have been employed by the employer for at least 30 calendar days. Notably, standard FMLA eligibility requirements (i.e., that the employee has been employed for one year, has worked for at least 1,250 hours, and is employed
in a location where there are no less than 50 employees working within a 75-mile radius) would not apply to FMLA leave under the Act. In other words, employees who would not otherwise be eligible for standard FMLA leave may nevertheless be eligible for emergency leave under the Act.

**Emergency Paid Sick Leave**

Division E of the Act also implements a new federal paid sick leave law requiring employers to immediately provide additional paid sick leave to employees unable to work due to COVID-19-related circumstances (as set forth below). Full time employees must be provided up to 80 hours of such leave while part-time employees are entitled to an amount equal to the average hours worked by that employee in a two-week period.

The emergency paid sick leave applies to absences from work in the following COVID-19-related circumstances:

1. The employee is subject to a federal, state, or local isolation order related to COVID;

2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;

3. The employee is seeking a medical diagnosis because they are experiencing symptoms of COVID-19;

4. *To care for or assist an individual:
   a. Who is self-isolating because of diagnosis with COVID-19 or who is experiencing symptoms of COVID-19 and needs to obtain medical diagnosis or care; or
   b. Whose presence in the community public official or a healthcare provider has determined would jeopardize the health of other individuals in the community because of their exposure to, or exhibition of symptoms of, COVID-19; or

5. *To care for a child whose school or place of care has been closed or whose childcare provider is unavailable due to COVID-19.

If the employee is a healthcare provider or an emergency responder, the employer may elect to exclude them from the emergency paid sick leave requirements.

Critically for California employers, this paid sick leave must be provided in addition to any existing paid sick leave provided by the employer. Employers may not require employees to exhaust other paid leave or to find another employee to cover their work hours as conditions of using leave under the Act.

Emergency paid sick leave must generally be paid at the employee’s regular rate of pay and is capped at $511 per day and $5,100 total. However, when the leave is taken for a purpose marked with an asterisk above, the leave may be paid at two-thirds of the employee’s regular rate of pay and is capped at $200 per day and $2,000 total.
Failure to provide or properly pay for such leave will be deemed a minimum wage violation and will subject the employer to additional penalties.

Employers are required to post a notice regarding employee’s entitlement to such leave. Within 7 days of enactment of the Act, the Secretary of Labor is required to make available a sample notice that employers may use to meet this obligation.

Job Protection Status

Both forms of leave under the Act are job-protected leaves. This means that employees returning from leave must be restored to the same or an equivalent position.

This requirement, however, does not apply to an employer with less than 25 employees if the employee’s position no longer exists due to economic conditions or other changes in operations caused by the public health crisis during the employee’s leave. Even in these situations, however, the employer must make efforts to contact the employee and provide reinstatement if an equivalent position becomes available within one-year of the date (1) the qualifying circumstances related to the public health crisis ends; or (2) that falls 12 weeks after the beginning of the employee’s leave, whichever is earlier.

The Act does not address whether employees may be required to submit documentation of the qualifying need for leave. However, the Centers for Disease Control has advised employers not to require a healthcare provider’s note for employees to validate their illness or return to work “as health care provider officers and medical facilities may be extremely busy and not able to provide such documentation in a timely way.”

Tax Credits

Employers who pay for the benefits required under the Act are eligible to receive certain refundable tax credits which may be used against the employer portion of Social Security taxes, as follows:

- Equal to 100% of leave wages under the FMLA expansion paid by the employer each calendar quarter, capped at $200 per day and $10,000 for all calendar quarters.

- Equal to 100% of the qualified paid sick leave wages paid by an employer for each calendar quarter, capped at the applicable daily rates noted above.

Unemployment Insurance

Division D of the Act also approves provision of $1 billion in grants to states who comply with specific requirements for emergency unemployment insurance benefits. Half of this appropriation will be provided to the states within 60 days, while the remainder is reserved for states that experience an increase in benefits due by at least 10% over the corresponding calendar quarter in the prior year.

Kring & Chung, LLP is continuing to monitor and work with our clients to respond to federal, state, and local government responses to this evolving situation. Kyle D. Kring is a Managing Partner of Kring & Chung, LLP. He can be reached at (949) 261-7700 or
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