



THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT: A PRIMER FOR EMPLOYERS

On March 18, 2020 the United States Senate passed the Families First Coronavirus Response Act (“FFCRA”) and President Trump signed it into law that day.

In addition to providing more money to states for unemployment benefits and mandating COVID-19 testing that is cost free to consumers, the FFCRA expands the Family and Medical Leave Act (“FMLA”) and institutes Emergency Paid Sick Leave Act (“EPSLA”), as explained below. The new provisions of the FFCRA are applicable to all businesses with fewer than 500 employees. Unlike similar leave-related laws, there is no minimum business size below which the provisions do not apply. However, the FFCRA requires the Secretary of Labor to create standards and procedures by which businesses with fewer than 50 employees can seek exemptions, if compliance with the law would jeopardize the viability of the business. However, employers that employ health care providers and emergency responders may elect to exclude those employees from the public health emergency leave requirements. Importantly, the provisions of the FFCRA must go into effect “no later than 15 days” following its signature, which would fall on Friday April 2, but it is presently unknown if it will be triggered prior to that deadline. All provisions related the expanded FMLA and EPSLA terminate on December 31, 2020.

The new provisions to the FMLA allow employees who have been with a business for 30 or more days to take up to 12 weeks of job-protected leave if the 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 child care provider of such son or daughter is unavailable”, due to a COVID-19-related emergency declared by a Federal, State, or local authority. The first 10 days (two weeks) of such leave are unpaid, but during that time an employee may elect to use sick leave, vacation leave, or other personal days that might be available from their employer. For the ten weeks thereafter, employers must compensate the employees at 2/3 of their regular rate of pay. However, wages under the FMLA extension are capped at \$200 daily and \$10,000 total, per person. Part-time employees are compensated for the number of hours worked in their customary week. In the event that it cannot be determined how many hours the employee would have worked, but for the leave, the average daily hours for the employee calculated over the prior 6 months is used. As with traditional FMLA leave, when the employee returns, the employer is required to make reasonable efforts to restore them to a position equivalent to the position held pre-leave, including benefits, pay, and other terms and conditions.

The EPSLA requires that all employers provide a new class of sick leave in addition to any leave they might have previously allowed under their own policies or other laws, regardless of how long an employee has been with the company. Full-time employees are entitled to 80 hours (10 days) of EPSLA leave and part-time employees are entitled to leave totaling the number of hours they work, on average, over a two-week period (as in the FMLA extension, this is calculated from the prior 6 months). The leave can be used if the employee is “unable to work (or telework)” for 6 reasons: 1) government quarantine or isolation order; 2) doctor-advised self-quarantine; 3) he/she is experiencing COVID-19

symptoms, and seeking a medical diagnosis; 4) caring for someone subject to categories 1-2; 5) caring for child due to school/child care closure; or 6) other substantially similar condition as may be specified by department of Health and Human Services. Employees taking leave under categories 1-3, above, must be paid at their customary rate of pay, capped at \$511 per day and \$5,100 total, per employee. Employees taking leave under categories 4-6, above, must be paid at 2/3 their customary rate of pay (but no less than the applicable minimum wage), capped at \$200 per day and \$2,000 total, per employee. EPSLA sick leave cannot be carried over into 2021 if not used. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment. Importantly, an employer cannot require that an employee use his/her traditional sick leave before taking EPSLA leave. Finally, employers are required to post a notice describing the leave available under EPSLA. A model notice is to be released by March 25, 2020.

The government will compensate employers for the additional expense of the FMLA expansion and EPLSA leave by allowing business to take a credit against quarterly payroll taxes equal to 100% of the wages paid under the FMLA expansion and the EPLSA, subject to the same caps applicable to the wages paid. The credit due cannot exceed the tax owed, but wages paid in excess of payroll taxes will be treated as a tax overpayment and refund will be issued. The amount of the credits and refunds will be treated as business income of the employer so as to not allow a double benefit by counting expenses of wages that were effectively refunded.

The Maloney Firm will continue to monitor and update this bulletin as the various agencies involved issue their guidelines and rules for implementing the act.

If you have questions regarding this article, contact The Maloney Firm at 310.540.1505.