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PLLC

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## **THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (“FFCRA”), or H.R. 6201, a multibillion-dollar emergency aid package aimed at helping Americans impacted by COVID-19. The FFCRA contains the first-ever federal paid sick time mandate, which requires most private employers with fewer than 500 employees to provide the equivalent of up to two weeks of paid time off to workers if they are unable to work for reasons tied to COVID-19, including if they are subject to quarantine or have to care for a loved one who is. The FFCRA also includes an emergency expansion to the Family and Medical Leave Act (“FMLA”) leave for reasons tied to COVID-19. Employers subject to the mandates must be prepared to implement the leave programs on or before April 2, 2020.

### **Emergency Paid Sick Leave Act**

Under the Emergency Paid Sick Leave Act (“EPSLA”), private employers with fewer than 500 employees and public agencies with at least one employee must provide employees a certain amount of paid time off based on full-time or part-time status, *regardless of the length of employment*, if they are unable to work or telework for reasons tied to COVID-19, specifically if:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19. The pay rate for the paid time off is 100% of employee’s normal pay rate, capped at \$511 per day or \$5,110 for total leave allowed; or
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. The pay rate for the paid time off is 100% of employee’s normal pay rate, capped at \$511 per day or \$5,110 for the total leave allowed; or
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. The pay rate for the paid time off 100% of employee’s normal pay rate, capped at \$511 per day or \$5,110 for the total leave allowed; or
4. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or an individual that has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. The pay

rate for the paid time off is two-thirds of the employee's rate, capped at \$200 per day or \$2,000 for the total leave allowed; or

5. The employee is caring for his or her son or daughter if the school or place of care has been closed or the child care provider is unavailable due to COVID-19 precautions. The pay rate for the paid time off is two-thirds of the employee's rate, capped at \$200 per day or \$2,000 for the total leave allowed; 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". The pay rate for the paid time off is two-thirds of the employee's rate, capped at \$200 per day or \$2,000 for the total leave allowed.

Full-time employees are entitled to emergency paid sick time under the EPSLA up to eighty hours, while part-time employees are entitled to emergency paid sick time up to the average number of hours that such employee works over a two-week period. If the schedule of a part-time employee varies from week to week, the employee's allowable emergency paid sick time is calculated as follows: "(i) . . . the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type"; or (ii) "[i]f the employee did not work over such [6-month] period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work." *Sec. 5110(5)(C)*.

Any unused emergency paid sick time under the EPSLA cannot be carried over past December 31, 2020, and any emergency paid sick time taken shall cease once the need for such leave no longer exists.

Employers cannot require the employee receiving paid sick time under the EPSLA to find another individual to cover the work hours missed. Employers can require employees to provide reasonable notice to their employer regarding the status and reasoning for such emergency sick leave in order to continue receiving such emergency sick leave pay. Important to note: Employers shall not require employees to use other paid leave prior to using paid sick time provided under the EPSLA, although it appears that employers who already provide sick leave covering COVID-19 absences for the specific events listed above should contact employment counsel before changing any existing policies. Employers can be assessed civil penalties for taking adverse action or retaliating against an employee who uses emergency sick leave pay or complains about a violation under the EPSLA.

Employers of health care providers and emergency responders have the option to exclude their employees from receiving emergency paid leave under the EPSLA. Additionally, the EPSLA grants authority to the Secretary of Labor to issue regulations exempting small businesses with fewer than 50 employees from the requirement of paying for emergency sick leave if this would jeopardize the viability of the business as an ongoing concern. The Secretary of Labor must issue implementation guidelines on or before April 2, 2020, which will include a model notice that all covered employers must post to employees.

## *Emergency Family and Medical Leave Expansion Act*

The FFCRA also amends the Family and Medical Leave Act (“FMLA”) to give employees long-term paid time off, at a partial pay rate, for a “qualifying need related to a public health emergency” concerning COVID-19. Specifically, eligible employers must provide up to 12 weeks of job-protected leave under the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) to *employees employed by the employer for at least 30 days* (before the first day of leave) to allow an employee, who is unable to work or telework, to care for the employee’s child (under 18 years of age) if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency. “Public health emergency” is defined as “an emergency with respect to COVID-19 declared by a federal, state or local authority.” *Sec. 3102(b)*.

The EFMLEA only applies to private employers *with fewer than 500 employees*, and public agencies with at least one employee. The language of the EFMLEA is not clear on the application of the 75-mile radius rule in defining an eligible employee for purposes of the EFMLEA. Regulations from the Secretary of Labor expected to be circulated on or before April 2, 2020 should clarify this.

The structure of the leave allowed under the EFMLEA is significantly different than the standard for FMLA leave. While standard FMLA leave is unpaid, *public emergency leave is only unpaid for the first 10 days*. During these first 10 days, an employee *may* choose to substitute paid time off they have accrued under any applicable employer policy, but the employer *may not* require the employee to use their paid leave. Also, “emergency paid sick leave” created under the EPSLA would apply to this initial period. After the initial 10-day period, the employer must provide *paid leave* (as defined below) for each subsequent day of leave taken under the EFMLEA, up to a total of 12 weeks. This is unlike any other type of FMLA leave. The amount of pay during such leave is calculated at two-thirds of the employee’s regular rate of pay for the number of hours the employee would normally be scheduled to work, **capped at \$200 per day or \$10,000 for the entire 12-week period**. For perspective, the per-day cap would usually kick in for full-time employees making more than \$78,000 per year. Part-time employees are entitled to pay based on an average of the number of hours that such employee works over a two-week period. If the schedule of a part-time employee varies from week to week, the employee’s hours to be paid shall be calculated as follows: “(i) . . . the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type”; or (ii) “[i]f the employee did not work over such [6-month] period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.” *Sec. 3102(b)*.

Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken leave under the EFMLEA to the same or equivalent position upon their return to work. However, under the EFMLEA, employers with fewer than 25 employees are generally excluded from this requirement if the employee’s position no longer exists following the public emergency leave due to an economic downturn or other circumstances caused by a public health emergency during the period of public emergency leave. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee’s leave.

The leave under the EFMLEA is only available until Dec. 31, 2020.

Employers of health care providers and emergency responders have the option to exclude employees from receiving paid public emergency leave. Additionally, the EFMLEA grants authority to the Secretary of Labor to issue regulations exempting small businesses with fewer than 50 employees from the requirement of paying for public emergency leave if this would jeopardize the viability of the business as an ongoing concern.

### **Tax Credits For Paid Sick And Paid Family And Medical Leave**

The FFCRA provides refundable tax credits for employers to help cover the cost of benefits provided under the EPSLA and the EFMLEA. Employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid under the EPSLA for each calendar quarter and 100% of the qualified family leave wages paid under the EFMLEA for each calendar quarter. The total amount of qualified sick leave wages paid (in the first two weeks) and qualified family leave wages paid (in the following 10 weeks) during that quarter would be allowed as a credit against the employer portion of the social security taxes (at 6.2%) that would otherwise be due from the employer. Any excess amounts above and beyond the employer-portion of the social security taxes would be refunded as a credit (as if the employer had overpaid the employer-portion of the social security taxes for that period).

### **What Does This Mean For My Business?**

Clarifying regulations are expected to be published in the next two weeks to provide further guidance on the implementation of these new mandates. Understanding the ramifications of the Families First Coronavirus Response Act and how it applies to your business is essential to carrying out the new law correctly. When in doubt, call the attorneys of Holifield Janich & Ferrera, PLLC for guidance.