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M E M O R A N D U M

TO: Employers

FROM: MDM&C Labor & Employment Group

DATE: March 23, 2020

SUBJECT: Emergency Family and Medical Leave Expansion Act
Emergency Paid Sick Leave Act

This is a summary of the emergency family and medical leave and paid sick leave provisions of the “Families First Coronavirus Response Act” (H.R. 6201), which Congress passed and the President signed on March 18, 2020. These provisions provide for emergency paid sick leave and for an emergency expansion of benefits under the Family Medical Leave Act (“FMLA”). The sick leave benefits apply to all employees regardless of length of service, while the expanded family leave provisions apply to employees that have worked for the employer for at least 30 calendar days.

These provisions, entitled the “Emergency Family and Medical Leave Expansion Act” (“EFMLEA”) and the “Emergency Paid Sick Leave Act” (“EPSLA”), respectively, will take effect “not later than 15 days after the enactment” of the Act (i.e., by April 2, 2020), and will expire on December 31, 2020. Both the EFMLEA and the EPSLA apply to private employers with fewer than 500 employees, and to certain public employers.

The Department of Labor (“DOL”) has been empowered to issue regulations to exclude employers of less than 50 employees from the requirements of these laws if compliance will jeopardize “the viability of the business as a going concern.” The DOL also is empowered to exclude certain health care providers and emergency responders from these requirements.

Both Acts prohibit discrimination and retaliation against employees invoking their benefits.

A. Employers Covered

Unlike the “standard” FMLA (which covers employers with 50 or more employees), both the EFMLEA and EPSLA cover private employers only with *fewer* than 500 employees. Like the FMLA, both also cover the following employees of public agencies:

- (1) Civilian employees in the Federal military departments;
- (2) Certain employees in Federal executive agencies;
- (3) Employees in any unit of the Federal judicial branch that has positions in the competitive service;
- (4) Employees in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces;
- (5) Employees of the Library of Congress or the Government Publishing Office;
- (6) Employees of the United States Postal Service or the Postal Regulatory Commission; and
- (7) Anyone employed by a State, political subdivision of a State, or an interstate governmental agency, *except for* individuals who are not subject to the civil service laws of the applicable State, political subdivision, or agency; *and*:
 - a. hold a public elective office of that State, political subdivision, or agency; or
 - b. are selected by the office holder to be a member of his/her personal staff; or
 - c. are appointed by the officeholder to serve on a policymaking level; or
 - d. are an immediate adviser to the officeholder with respect to the constitutional or legal powers of his/her office; or
 - e. are employed in the legislative branch or legislative body of that State, political subdivision, or agency and not employed by the legislative library of such State, political subdivision, or agency.

Although the definition of covered employers for both Acts is the same, there are differences in employee eligibility, as discussed below.

B. Emergency Family and Medical Leave Expansion Act

Eligible Employees: The EFMLEA covers employees who have been employed for at least 30 calendar days. This differs from the “standard” FMLA, which only covers employees who have been employed for at least a year and have worked 1,250 hours. Health care providers and emergency responders may be excluded by their employers from the expanded family and medical leave provisions of the EFMLEA.

Reason for Leave: The EFMLEA temporarily amends the FMLA to provide for leave based upon a “qualifying need related to a public health emergency,” which means the employee is unable to work (or telework) due to a need to care for a son or daughter under age 18 if the child’s school or place of care has been closed, or the child’s child care provider is unavailable, due to a public health emergency. This leave entitlement is limited to the period beginning on the date the EFMLEA takes effect (“not later than 15 days after the date of enactment of this Act”, *i.e.*, April 2, 2020) and ending on December 31, 2020.

Amount of Leave: Employees eligible for EFMLEA leave may take up to the maximum twelve weeks of protected leave provided for by the FMLA. However, the EFMLEA additionally requires covered employers to provide *paid* leave once the leave exceeds ten days. The first ten days may be unpaid, although an employee may elect to substitute any accrued vacation, personal leave, or medical or sick leave for the unpaid leave. The EPSLA, discussed below, requires covered employers to provide up to two weeks of paid sick time for eligible employees, including employees who have taken EFMLEA leave.

After ten days, the employer must provide *paid* leave calculated in an amount based on (1) at least two thirds of the employee's "regular rate of pay" (as determined under the Fair Labor Standards Act); and (2) the number of hours the employee normally would have been scheduled to work. (Special rules apply for employees whose schedules vary from week-to-week). However, the paid leave under the EFMLEA is subject to a daily cap of \$200, and the maximum dollar amount of paid EFMLEA leave an employer is required to pay is \$10,000 per employee.

It is important to note that because the EFMLEA amends the FMLA to add a new qualifying reason for FMLA leave, an employee who already has used all or part of his/her FMLA leave will not be eligible for a full 12 weeks of leave under the EFMLEA. Similarly, an employee who exhausts his/her FMLA leave for EFMLEA purposes will not be eligible for another FMLA leave within the same twelve-month period.

Employee Notice Required: Where the need for EFMLEA leave is foreseeable, the employee must provide the employer "with such notice as is practicable."

Restoration to Position: The FMLA's requirements concerning maintenance of benefits during protected leave, and restoration to the same or equivalent position upon return from leave, generally apply to EFMLEA leaves.

However, the restoration requirements do not apply to employers with less than 25 employees where certain conditions are met, including that the employee's position no longer exists as a result of conditions "caused by a public health emergency during the leave," the employer has made "reasonable efforts" to restore the employee to an equivalent position, and the employer has made "reasonable efforts" to contact the employee if an equivalent position becomes available during the one-year period following the earlier of (1) the date on which the need for EFMLEA concluded; or (2) twelve weeks after the employee's EFMLEA leave began.

C. Emergency Paid Sick Leave Act

Eligible Employees: All employees of employers covered by the EPSLA are eligible regardless of how long they have been employed.

Reasons for Paid Sick Time:

Covered employers are required to provide up to two weeks of paid sick time to employees who are unable to work (or telework) due to one of the following COVID-19 related reasons:

- (1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or is caring for an individual who is subject to such an order.
- (2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, or is caring for an individual who has been advised to self-quarantine.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (4) The employee is caring for his/her child if the school or place of care for the child has been closed, or the child's childcare provider is unavailable, due to COVID-19 precautions.
- (5) 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.

Duration and Amount of Paid Sick Time: Employees of covered employers are eligible for up to two weeks of paid sick time under the EPSLA. Full time employees are eligible for up to 80 hours of pay at their regular rate of pay, while part-time employees are eligible for payments up to the equivalent of the average number of hours they worked over the prior two weeks.

Paid sick time under the EPSLA must be made available for immediate use by the employee, regardless of how long the employee has been employed by the employer.

EPSLA paid sick time is in addition to any paid sick time already available to employees. Employers may not require employees to use other paid leave provided by the employer before using EPSLA paid sick time.

No carryover of EPSLA paid sick time from one year to the next is permitted. Nor are employees entitled to any payout of unused EPSLA sick time upon termination of employment for any reason.

The maximum amount of EPSLA paid sick time depends on whether the absence is due to the employee's own COVID-19 circumstance or is in order to care for someone else, as follows:

- (1) Employees who cannot work (or telework) because of their *own* COVID-19 situation (i.e., those subject to a Federal, State, or local quarantine or isolation order, or advised by a health care provider to self-quarantine due to COVID-19 concerns, or experiencing COVID-19 symptoms and seeking a medical diagnosis), are eligible for

EPSLA paid leave at their regular rate of pay, up to a maximum of \$511 per day and a \$5,110 total cap.

- (2) Employees who cannot work (or telework) because they are caring for someone else experiencing a COVID-19-related circumstance (i.e., caring for someone subject to a Federal, State, or local quarantine or isolation order, or advised by a health care provider to self-quarantine, or caring for his/her child under age 18 or a child over 18 who is incapable of self-care due to a disability if the child's school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions) are entitled to leave at two-thirds of their regular rate of pay, up to a maximum of \$200 per day with a \$2,000 total cap.
- (3) Employees who experience "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" also may be entitled to leave at two-thirds of their regular rate of pay, up to a maximum of \$200 per day with a \$2,000 total cap.

Required Postings: Employers will be required to post notices of the EPSLA's requirements using a model notice prepared or approved by the DOL.

D. Multi-Employer Collective Bargaining Agreements

Employers who are parties to multi-employer collective bargaining agreements may fulfill their paid leave obligations under both the EFMLEA and the EPSLA with contributions, based on the paid leave or sick time each employee is entitled to under the statutes, to a multi-employer plan, benefit, program or fund that allows employees to receive payment based on the hours they have worked and the uses specified under the statutes.

E. Tax Credits

In order to provide financial assistance to employers, the Families First Coronavirus Response Act allows employers to recover their EFMLEA and EPSLA leave payments through payroll tax credits. Employers can receive credits equal to 100% of the qualified EPSLA payments, and up to \$200 per day and \$10,000 per employee for amount of paid EFMLEA leave benefits. This was confirmed on Friday, March 20, 2020 by the IRS and Treasury Department, which announced that employers will be able to recover their leave payments "dollar-for-dollar."

Please do not hesitate to contact us should you have any questions.