Acentria Insurance

Compliance ALERT

Coronavirus Bill Requiring Paid Leave and Other Benefits Signed Into Law

March 20, 2020

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act ("FFCRA" or "the Law"), an emergency relief law designed to address the effects of the coronavirus/COVID-19 pandemic ("coronavirus"). The legislation includes several measures intended to protect the health, safety and financial security of families and workers whose jobs and healthcare have been affected by the coronavirus health emergency, including required changes to medical plans, required paid leave provisions, and additional unemployment compensation and food aid.

Background on FFCRA

Senate lawmakers moved quickly to approve the House coronavirus relief bill (discussed in our prior eAlert **here**) in light of the increasingly devastating impact that the coronavirus pandemic is having on the U.S. economy. Beginning on March 16, several amendments to the FFCRA were added that reduced and more narrowly defined the qualifying reasons for taking emergency paid sick leave and paid leave under the Family and Medical Leave Act (FMLA). What follows is a summary of the final version of the FFCRA's provisions that are most relevant to employers and plan sponsors.

FFCRA : Coronavirus Medical Treatment Provisions

Coronavirus Testing – Is it Free? Are There Any Exceptions or Different Costs for In-network and Out-of-network Coverage or Self-Insured vs. Fully-Insured Coverage, or for Grandfathered Plans under the ACA?

Yes, the Law makes coronavirus testing free on all group and individual health insurance coverage, including grandfathered plans (as defined in Section 1251(e) of the ACA). Additionally, there are no cost differences addressed in the Law between in-network vs. out-of-network coverage, or self-insured vs. fully-insured plans. Specifically, the bill requires that private health insurers (plus government health insurance programs like Medicare and Medicaid) cover the cost of coronavirus testing, including emergency room visits and doctors' fees associated with such testing.

What about Telehealth Services Related to Coronavirus, Are these Free?

Yes, telehealth services are free with respect to coronavirus testing. Specifically, the FFCRA was amended to say that plans shall not impose any cost sharing for telehealth services related to coronavirus testing. What is still not clear from the added language, however, is whether plans currently offering telehealth through a contracted stand-alone vendor (*e.g.*, Teladoc) are now required to offer coronavirus screenings via telehealth visits if they were not already doing so.

Can Plans Waive Cost-Sharing for all Telehealth Services on High Deductible Health Plans?

The FFCRA does not address this issue. Accordingly, there are still questions remaining regarding whether plans may waive cost-sharing for all telehealth services (*i.e.*, not just coronavirus-related

SYNOPSIS

Beginning on March 16, several amendments to the Families First Coronavirus Response Act were added that reduced and more narrowly defined the qualifying reasons for taking emergency paid sick leave and paid FMLA.

The law confirms that COVID-19 testing will be provided free on all group and individual health insurance coverage and telehealth testing services related to the virus.

The law does not cover the cost of treating the virus.

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services) in light of the extremely infectious nature of this virus and the health risks that it presents to older and more vulnerable plan participants who may get infected when going into medical facilities or doctors' offices to get regular, non-coronavirus-related care.

While this question remains unanswered, **IRS guidance** issued last week clarifies that the cost of coronavirus testing and treatment does not need to be applied toward the HDHP's minimum annual deductible.

Coronavirus Treatment - Is it Free?

No, the Law does not make treatment for the coronavirus free.

FFCRA – Paid Leave Provisions

The FFCRA requires certain employers to provide paid leave to employees impacted by the coronavirus, and additionally, the Law provides for a refundable tax credit to employers to offset the cost of this required paid leave. What follows is a summary of the two main Subdivisions or Acts of the FFCRA relevant to the Law's paid leave provisions:

- The Emergency Paid Sick Leave Act
- The Emergency Family and Medical Leave Expansion Act

Emergency Paid Sick Leave Act Background

The Emergency Paid Sick Leave Act ("EPSLA") requires emergency paid sick leave ("EPSL") for specified coronavirus-related reasons (described below) in the following amounts:

- 80 hours for full-time employees;
- the equivalent of two weeks of pay for part-time employees, based on the number of hours such employees work, on average, over a two-week period; and
- two-thirds of the amounts above for leave required when the employee is caring for an individual who is under a government-ordered quarantine or a quarantine recommended by a health care provider, or because of a need for childcare resulting from school closures.

When does the EPSLA become Effective?

The EPSLA becomes effective no later than 15 days after the date that the statute is enacted (which is April 2, 2020), which means that the U.S. Department of Labor (DOL) could issue rules making the law go into effect earlier. The Secretary of Labor is required to issue guidelines to assist employers in calculating EPSL by April 2, 2020.

Which Entities are Covered Employers under the EPSLA?

Any private employer engaged in commerce that employs "fewer than 500 employees," and any public employer that employs at least one employee. The statute does not specifically address whether separate employers that are part of the same controlled group or corporate family are permitted to aggregate their employees together for purposes of determining "covered employer" status under the EPSLA (this topic is discussed in more detail below).

Which Employees are Eligible for EPSL? Are Any Employees Exempt?

All employees of a covered employer, without regard to length of employment or number of hours worked are eligible for EPSL. However, covered employers may elect to exclude health care providers and emergency responders from EPSL. The statute incorporates the FMLA definition of "health care provider," and grants authority to the DOL to issue regulations to implement this exemption.

For What Reasons can an Eligible Employees Take EPSL Leave? When Does it End?

Eligible employees of a covered employer can take EPSL leave for the following reasons:

- When the employee is subject to a federal, state, or local quarantine or isolation order related to coronavirus.
- When the employee has been advised by a health care provider to self-quarantine due to concerns related to coronavirus.
- When the employee is experiencing symptoms of coronavirus and seeking a medical diagnosis.
- When the employee is caring for an individual (not just family members) who is subject to a quarantine order or who has been advised to self-quarantine.
- When the employee is caring for his or her child if the school or place of care of the child has been closed, or the childcare provider of such child is unavailable due to coronavirus precautions.
- When the employee is experiencing any other substantially similar condition specified by the Secretaries of Health and Human Services (HHS), Treasury or Labor.

EPSL ends with the employee's next scheduled work shift immediately following the end of the covered need for EPSL.

How much EPSL must Covered Employers Provide?

For full-time employees, 80 hours of leave must be

provided. For part-time employees, the average number of hours that the employee works over a two-week period.

At What Rate of Pay must EPSL be Paid?

EPSL must be based on the rate of pay that is the greater of the employee's regular rate of pay (calculated in accordance with Fair Labor Standards Act (FLSA) rules), federal minimum wage, or applicable state or local minimum wage. While the EPSLA does not specifically address how to calculate the rate of pay for salaried employees, their regular salary should be used to calculate EPSL pay.

For EPSL taken for the employee's own coronavirus-related reasons, EPSL must be paid at the employee's full rate of pay. For EPSL taken to care for another individual, because of childcare issues, or because the employee is experiencing a specified substantially similar condition, EPSL must be paid at two-thirds of the employee's full rate of pay.

The statute does not address the extent to which employer-provided benefits must be continued during this period. If the EPSL period coincides with an FMLA period, then benefits would be continued in accordance with the FMLA. Otherwise, employers should look to their paid leave policies in the absence of guidance from regulators.

What are the Limits on the Dollar Amounts Covered Employers Must Pay as EPSL?

EPSL payments are capped at $511 per day and $5,110 in the aggregate for EPSL taken for the employee's own coronavirus-related reasons. The amount of EPSL paid to an employee is capped at $200 per day and $2,000 in the aggregate for EPSL taken to care for another individual, because of childcare issues, or because the employee is experiencing a specified substantially similar condition.

Can EPSL be Used before Using Other Forms of Paid Leave? Can an Employer Use Other Forms of Paid Leave to Satisfy the EPSL Requirements?

Yes. Employees may use EPSL first, and employers cannot require an employee to use other paid leave provided by the employer before using EPSL. Unfortunately, however, the EPSLA does not indicate whether paid sick leave already being provided by a covered employer (whether pursuant to other an applicable state mandate, an employer policy or otherwise) can be used to satisfy the EPSL requirement.

Do Small Employers have any Special Exceptions or Exemptions?

Yes. The EPSLA authorizes the DOL to issue rules to exempt small businesses with fewer than 50 employees from the requirements of providing paid leave to care for a child who is out of school due to a school closure (the EPSL permitted reason above) when the imposition of such requirements would "jeopardize the viability of the business as a going concern."

How are EPSLA Payments Treated for Payroll Tax Purposes?

Wages required to be paid under the EPSLA are not subject to the employer's portion of social security payroll taxes. The amount of the tax credit is also increased by the amount of the Medicare hospital insurance tax imposed on the employer for qualified sick leave wages or qualified family leave wages, for which a credit is allowed.

Does the EPSLA Contain any Tax Relief Provisions?

Yes. All employers required to pay wages under the EPSLA to employees are eligible for a refundable federal tax credit that will offset the employer's share of social security taxes. Federal, state and local governments are not eligible for the federal tax credit.

Generally, employers can claim a tax credit of up to $200 per day for each employee caring for a sick family member and up to $511 per day for each employee who is sick and apply it against the employer's aggregate social security or tier 1 railroad retirement tax liability. The credit is limited to 10 days per employee, and must relate to wages paid on or before December 31, 2020.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (EFMLEA) amends the FMLA to require emergency paid family medical leave ("paid FMLA leave" or "PFML") when an employee must care for a child under 18 years old because of a school closure or other lack of childcare caused by coronavirus. This paid FMLA leave begins after 10 days of qualifying emergency leave (during which most covered employees would get paid leave under the EPSLA).

When Does the EFMLEA go into Effect?

The EFMLEA becomes effective 15 days after the date the statute is enacted (April 2, 2020), but as with the above rules, the DOL could issue rules making the law go into effect earlier.

How does the EFMLEA change the FMLA?

The EFMLEA adds the following as a qualifying reason for taking leave under the FMLA: "During the period beginning on the date of the Emergency Family and Medical Leave Expansion Act takes effect [March 18, 2020], and ending on December 31, 2020, because of a qualifying need related to a public health emergency." The statute then creates a number of different coverage definitions that apply only to PFML (that is, when there is such a "public health emergency") and not to other types of FMLA leave.

Which Entities are Covered Employers under the EFMLEA?

The same definition of "covered employer" in the EPSLA applies to the EFMLEA, that is, a "covered employer" is any employer (private or public) engaged in commerce that employs fewer than 500 employees.

Which Employees are Eligible for PFML? Are Any Employees Exempt?

Any employees of a covered employer who have been employed for at least 30 calendar days. It should be noted that that this is broader than the regular FMLA requirement that an individual must be employed for 12 months and have worked at least 1,250 hours in the preceding 12 months to be eligible for FMLA leave.

As with the paid leave rules above, covered employers may exclude health care providers and emergency responders from PFML. The EFMLEA authorizes the DOL to issue rules to implement this exemption.

For what Reasons Can an Eligible Employee Take PFML Leave for a Public Health Emergency?

PFML is available only in situations when the employee is unable to work (or telework) due to a need for leave to care for the employee's child under 18 years of age if the school or place of care has been closed, or if the childcare provider of such child is unavailable, due to a coronavirus-related emergency declared by a federal, state, or local authority.

What School Closures are Covered?

"School" is defined as a nonprofit institutional day or residential school, including a public elementary or secondary charter school that provides elementary/ secondary education, except that the term does not include any education beyond grade 12.

How much PFML Must be Provided by Covered Employers?

PFML is a type of FMLA leave and is subject to the same overall entitlement of 12 weeks during the applicable 12-month period as other FMLA leave (*i.e.*, the EFMLEA does not expand the amount of FMLA leave an employee is entitled to in the applicable 12-month period). While not addressed in the statute, the benefits rights and obligations (*e.g.*, the right to continued health insurance) under the FMLA would also appear to apply.

Must Covered Employers provide PFML as Paid Leave?

Yes, but the first 10 days of PFML may consist of unpaid leave (however, presumably employees would have EPSL during this period). After the first 10 days, covered employers must provide paid PFML for the duration of the leave (until the earlier of when the situation requiring PFML has ended or when the employee has exhausted his or her 12-week FMLA entitlement).

At What Rate of Pay must PFML be Paid?

PFML must be based on the rate of pay that is at least two-thirds of the employee's regular rate of pay (calculated in accordance with FLSA rules).

Are there any Limits on What Covered Employers must Pay as PFML?

Yes. The amount of PFML paid to an employee is capped at $200 per day and $10,000 in the aggregate.

Are eligible employees allowed to substitute paid leave provided by the employer in lieu of unpaid PFML?

Yes. Employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid PFML (in accordance with normal FMLA rules for the substitution of leave). But as a practical matter, the unpaid portion of PFML will most likely be covered as paid leave under the EPSLA. The EFMLEA does not address whether employees are permitted to substitute full paid leave under other employer policies in lieu of PFML that is paid at two-thirds of the employee's normal pay rate. The statute is also silent on whether an employer may require an employee to substitute other paid leave in lieu of PFML, though an earlier version of the bill contained such a prohibition.

Do Small Employers Get Any Special Exceptions or Exemptions under the EFMLEA When Offering PFML to their Employees?

Yes. For employers subject to the PFML requirements of the EFMLEA, but that do not otherwise meet the regular requirements to be a covered employer under the FMLA (*i.e.*, employers that do not meet the normal 50-employee FMLA threshold), these employers are not subject to a private right of action by employees for damages for a violation of the PFML requirements. However, they do remain subject to an enforcement action by the DOL.

Additionally, the EFMLEA gives the DOL authority to issue regulations exempting small businesses with fewer than 50 employees from the PFML requirements when imposition of such requirements would jeopardize the viability of the business as a going concern.

How are EFMLEA payments treated for payroll tax purposes?

Wages required to be paid under the EFMLEA are not subject to the employer's portion of social security payroll taxes. The amount of the credit discussed below is also increased by the amount of the Medicare hospital insurance tax imposed on the employer for qualified sick leave wages or qualified family leave wages, for which a credit is allowed.

Is there any Tax Relief available under the EFMLEA? How Much Relief is Available?

Yes. All employers required to pay wages under the EFMLEA to employees are eligible for a refundable federal tax credit that will offset the employer's share of social security taxes. Federal, state, and local governments are not eligible for the federal tax credit. Eligible employers can claim a federal tax credit up to $200 per day, per employee, with an aggregate cap of $10,000 per employee against the employer's aggregate social security or tier 1 railroad retirement tax liability.

How are Commonly-Owned Companies Aggregated for Purposes of the 500-employee "Covered Employer" Threshold in these Paid Leave Provisions?

With regard to the EPSLA, the Law does not specifically address this aggregation issue. To the extent that two employers jointly employ a particular individual, they can likely both count that individual as an employee for purposes of determining coverage under the EPSLA. Specifically, because the EPSLA makes reference to the Fair Labor Standards Act's (FLSA's) enforcement provisions, employers should most likely use the DOL's standards set forth in the new FLSA joint employment regulation.

In addition, with regard to the EPSLA, employers may try to use the "integrated employer test" under the FMLA (discussed in the paragraph below) to aggregate their employees together for purposes of determining if they exceed the 500-employee threshold. However, given that the Law does not specifically address this question, and given the uncertainty that results from having statutory language, it would be advisable to be conservative when making this determination. The most conservative strategy for avoiding penalties would be to apply the less-favorable aggregation test (*i.e.*, the test that would be more likely to result in a finding that there are more employees).

With regard to the EFMLEA, while the Law does not specifically address this issue, since the EFMLEA amends the federal FMLA, it would be reasonable to apply the FMLA's aggregation test. Specifically, existing regulatory guidance under the FMLA (referred to as the "integrated employer test") explains when two or more related companies should be considered as a single employer for purposes of the FMLA. Under this test, the factors considered in determining whether two or more entities are an integrated employer include common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/ financial control. In addition, employers should consider whether they jointly employ a particular individual because current FMLA regulations provide that employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, when determining employer coverage and employee eligibility. Additionally, as with the EPSLA paid leave provisions, given the uncertainty that exists as a result of not having applicable statutory language, it would make sense to take the conservative approach and consider the less favorable aggregation test (*i.e.*, between the FLSA and FMLA).

Can Employers with 500 or More Employees Voluntarily Comply with these Paid Leave Provisions? If such Employers Voluntarily Comply, will they be Eligible for the Law's Favorable Tax Credits?

While employers with 500 or more employees may voluntarily comply, the Law's favorable leave and tax credit provisions would not apply to such employers. However, given the importance of assisting employees and helping them cope with medical and dependent care issues arising during this health emergency, and also, given the public perception issues of having a sick workforce actively employed (and potentially exposing other employees and the public to sickness), many employers and plan sponsors are closely considering expanding their existing

disability insurance and leave programs at this time.

What are the Penalties for Noncompliance with these Paid Leave Provisions?

A non-complying employer will be in violation of the Fair Labor Standards Act (FLSA), and will be subject to fines and penalties for failing to pay minimum wages under that law.

How are Furloughed Employees Affected by these Paid Leave Provisions? How is a "Furlough" Defined in the New Law?

A lot of questions have arisen as to how the Law's paid leave provisions described above affect furloughed employees. The general answer is that it depends on the type of furlough and how the furlough is defined under the employer's labor and employment policies, including any employee handbooks and collective bargaining agreements (CBAs). If the terms of the furlough, as defined in these applicable employment policies, permit employees to take leave for any of the above-referenced permitted reasons under the EPSLA or EFMLEA, then the employee should be entitled to paid leave under this Law. Because one of the purposes of this Law is "to avert layoffs," the drafters would likely prefer that employers initiate furloughs instead of layoffs.

A furlough is a type of leave from work that does not provide any pay or regular compensation. It is usually mandatory and may be caused by health emergencies like the coronavirus, the special needs of a particular organization, or economic conditions. Furloughs are generally used to cut costs or comply with government mandates. While the application of laws to furloughs depends in large part on how "furlough" is defined in your organization's employment policies, including any collective bargaining agreement (CBA), with most furloughs, employees are allowed to come back to work once regular business resumes. Additionally, in many furloughs (depending on the industry and applicable laws and regulations), employees can take leave. While some organizations implement a cyclical furlough schedule (*e.g.*, mandating a one-day furlough for the first Tuesday of every month), other organizations may offer optional furloughs which can be negotiated in individual employees' employment agreements.

A furlough is different from a layoff in that, in a layoff, there is no expectation of a return to work, whereas, by contrast, in most furloughs, employees are allowed to return to work at the end of the furlough time period. Accordingly, most furloughs are like "temporary layoffs."

Additionally, in such furloughs and temporary layoffs, temporarily laid-off employees will usually be able to collect unemployment benefits and, depending on the applicable medical plan or insurance policy, may be able to keep their medical and other insurance coverage as an incentive to stay available in the event that they are asked to return to work. By contrast, with the exception of unemployment compensation, these benefits are typically not available in permanent layoffs, although a severance package is often offered to employees in such workforce reductions.

Where Can I Go to Get Additional Information about These New Rules and Their Impact on our Benefits and Leave Programs?

The Foundation Risk Partners Compliance Team will continue to update the Compliance Section of the **Foundation Risk Partners Coronavirus/COVID-19 Employer Insurance Resources Page with additional eAlerts and information about legal and regulatory developments pertaining to the coronavirus pandemic. In addition to posting information about new legal and regulatory developments, we will also be posting helpful videos, guides and FAQs to assist your organization with leave events, layoffs, terminations, furloughs and other similar types of workplace changes that may be occurring during this health emergency.**

If you have questions, please call your Acentria Insurance Account Manager or 866.374.5084.

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