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COVID-19 Update: President Trump signs federal paid leave law

By Michael Hepburn, Deepa Menon, and Bonnie Burke

On Wednesday, March 18, President Trump signed the Families First Coronavirus Response Act, which includes new requirements for paid sick leave, an expansion of the Family and Medical Leave Act requirements, and requirements for free testing for COVID-19. While the legislation is far less sweeping than the original proposal in the House of Representatives, it does take steps to provide benefits to certain employees.

Paid Sick Leave

Effective 15 days following enactment, and for the duration of 2020, employers with fewer than 500 employees will be required to provide employees with paid sick leave consistent with the following rules:

**Evershed Sutherland Observation:** Employer groups with subsidiaries or affiliates that individually have fewer than 500 employees will need to consider the application to those entities.

- The amount of paid sick leave is essentially capped at two weeks (80 hours for full-time employees and based on average hours in a work week for part-time employees).
- Leave may be taken for the following reasons:
  1. the employee is subject to quarantine or isolation;
  2. the employee has been advised to self-quarantine;
  3. the employee is experiencing symptoms of COVID-19 and seeking treatment;
  4. the employee is caring for an individual subject to quarantine or isolation or who has been recommended to self-quarantine;
  5. the employee is caring for a son or daughter subject to a school closure or absence of care as a result of COVID-19 precautions; or
6. other similar situations approved by the Department of Health and Human Services.

The amount the employer must pay for the sick leave is capped at $511 per day per employee (up to a maximum of $5,110) in the case of the first three categories and $200 per day per employee (up to a maximum of $2,000) in the case of the remaining categories. Of course, the employer may be more generous.

Paid sick leave must be made immediately available for use by employees without any minimum service requirement. Employers may not require employees to use other accrued paid leave time before using this sick leave. This sick leave is to be used before the employee uses any other leave time, and availability will cease beginning with the employee’s next scheduled shift following the need for the sick leave.

Employers may also not require employees to search for, or find, a replacement during the time the employee is using the paid sick leave.

Employers must post a notice of this leave, a model of which will be available from the Department of Labor within a week after the enactment of the Act.

_Eversheds Sutherland Observation:_ Given the focus on work from home and social distancing, employers should also consider posting this notice on electronic intranets or emailing the notice to affected employees if it could apply to them.

Covered employers are prohibited from taking adverse action or otherwise discriminating against employees making use of the paid leave.

_Eversheds Sutherland Observation:_ Employers should also focus on their HIPAA and other ordinary course legal obligations regarding employees who report health or other conditions in connection with requests for paid sick leave benefits.

Refundable tax credits are available to offset the cost of the paid sick leave. The amount of the paid sick leave in each calendar quarter, subject to the limits noted above, is generally credited against the employer’s portion of Social Security and Medicare taxes that would otherwise be due for that quarter. An additional credit is also available for the allocable portion of health plan costs attributable to the paid sick leave.

DOL can exempt certain health care providers and emergency responders from coverage. DOL can also provide an exemption for businesses with fewer than 50 employees if compliance with the leave requirements would jeopardize the employer’s business as a going concern.
Eversheds Sutherland Observation: The “going concern” standard is generally a high bar. Given the refundable tax credits, it may be difficult for small employers to take advantage of this exemption.

FMLA Expansion
Also effective 15 days after enactment, for the duration of 2020, employers with fewer than 500 employees will be required to permit employees to take FMLA leave to care for a son or daughter under the age of 18 in the event that the child’s school is closed or childcare is unavailable due to a COVID-19 related emergency.

Eversheds Sutherland Observation: The “going concern” standard is generally a high bar. Given the refundable tax credits, it may be difficult for small employers to take advantage here again, the application to subsidiaries and affiliates with fewer than 500 employees should be considered.

Eversheds Sutherland Observation: While the FMLA expansion expressly refers to children under 18, no age limit applies in connection with the paid sick leave provisions.

Employees are eligible for this expanded FMLA leave following 30 days of employment.

The first 10 days of this expanded FMLA leave may be unpaid. Leave following that 10-day period must be paid at a rate that is not less than two-thirds of the employee’s regular rate of pay, up to $200 per day per employee (subject to a per employee maximum of $10,000). Employees are generally entitled to reinstatement following any leave, with certain exceptions for employers with fewer than 25 employees. Employees may use accrued paid leave time during the initial 10-day period.

Eversheds Sutherland Observation: To the extent that the FMLA leave overlaps with the paid sick leave rules, the entirety of the FMLA leave may effectively be paid leave.

Consistent with the paid sick leave rules, the DOL can exempt certain health care providers and emergency responders from coverage and can provide an exemption for businesses with fewer than 50 employees if compliance with the leave requirements would jeopardize the employer’s
business as a going concern. In addition, even without DOL exemptions, employers may exclude health care providers and emergency responders from eligibility under these expanded FMLA rules.

_Eversheds Sutherland Observation:_ As noted above, the “going concern” standard may be of limited availability.

Also consistent with the paid sick leave provisions, employers are allowed a credit against certain payroll taxes for amounts paid by reason of the expanded FMLA provisions. Additional credit is also available for certain health plan expenses of the employer allocable to the paid FMLA leave.

**Free Testing**

Effective immediately, and for the duration of the national emergency, group health plans as well as group and individual insurance contracts will be required to provide coverage for COVID-19 testing and certain costs relating to the administration of the test without application of any cost sharing such as copayments, coinsurance or deductibles. This applies to both self-insured and insured arrangements.

**Self-Employment Provisions**

Self-employed individuals may be entitled to credit against self-employment taxes for periods during which the individual is unable to perform services in connection with his or her trade or business. Credits are subject to limits consistent with those applicable to employer credits for paid sick leave described above.

While the Families First Coronavirus Response Act is the first Federal statute mandating paid leave, a number of states have paid leave laws. Under the current environment, states may enact new or additional measures. On the same day the President signed the new paid leave law, Governor Cuomo of New York signed a new leave law with immediate effect for New York employers.

For more information on COVID-19, please visit our Coronavirus resource page.

**About the authors:** Michael Hepburn is a Partner and Deepa Menon is an associate in the Washington, D.C., office of Eversheds Sutherland (US) LLP. Bonnie Burke is a staff attorney in the Atlanta office of Eversheds Sutherland (US) LLP.