

March 20, 2020

Coronavirus Related Leave Issues

By J. Scott Dillon and Kenneth R. Keller

The United States Senate has now passed, and the President has signed into law, the Families First Coronavirus Response Act, effective April 2, 2020 to December 31, 2020. Among other provisions, the Act modifies the Family Medical Leave Act and requires certain Employer funded sick leave.

Additionally, North Carolina Governor Roy Cooper has issued Executive Order 118, expanding unemployment benefits for North Carolina employees.

Reductions in workload and the need to avoid close contact raise issues on working remotely.

The Families First Coronavirus Response Act

- Becomes effective April 2, 2020 and expires December 31, 2020.
- Provides that paid leave accrued under normal policies cannot be applied to FMLA coronavirus leave.
- Sets up a paid sick leave requirement for employers with fewer than 500 employees for the benefit of employees who are unable to work or telework due to:
 1. being subject to a Federal, State, or local quarantine or isolation order related to the virus;
 2. have been advised by a health care provider to self-quarantine due to concerns related to the virus;
 3. are experiencing symptoms of the virus and are seeking a medical diagnosis;
 4. are caring for an individual who is subject to an order as described in 1 or has been advised as described in 2;
 5. are caring for their son or daughter under 18 if the school or day care has been closed; or
 6. are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Full-time workers can receive up to 80 hours of paid sick leave, and part-time workers can receive up to an amount equal to the average number of hours they work in a given two-week period. Pay is capped at \$511 per day and \$5,110 in the aggregate for employees in categories 1 through 3 above. Pay is capped at \$200 per day and \$2,000 in the aggregate for employees in categories 4 through 6 above. Employers may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave required by the Act. The required sick leave is paired with a refundable credit the employer can take to cover the employer's cost against quarterly payroll taxes the employer pays for Social Security (see below).

- Amends the Family and Medical Leave Act to set up a temporary emergency paid leave program through December 31. Requires private employers with fewer than 500 workers and government employers to provide employees up to 12 workweeks of leave, for those who have worked at least 30 days previously. The expansion applies only if the employee is unable to work or telework due to the need to take care of a child under 18 whose school or day care facility is closed due to a public health emergency. The first 10 days may be unpaid under the revised FMLA but generally would be covered by the newly enacted Emergency Paid Sick Leave Act requirement, or the employee could choose to use vacation leave or other eligible paid leave for these days. For the rest of the leave, employees would be entitled to at least two-thirds of their regular pay, up to \$200 per day and \$10,000 total. Employers with fewer than 25 employees do not have to reinstate an employee who takes leave if the position no longer exists and the employer tried to put the person in a similar position. Allows the Labor Department to exempt small businesses with fewer than 50 employees from this new leave requirement if it would put them in jeopardy. As with sick leave, the required family leave is paired with a refundable payroll tax credit to cover the employer's cost (see below). The other provisions of the FMLA pertaining to job protected leave (birth or placement of child, care for family member or own serious health condition, military obligations and medical treatment) are not affected.
- Provides payroll tax credits for employers required to provide emergency paid sick leave or family medical leave under the bill. The emergency paid sick leave credit provides a maximum credit of \$511 per day, for up to 10 days or two weeks, for employees on leave because they have the virus or are in quarantine. If the employee is on leave to care for a child whose school or daycare closed, or to care for a person who is in quarantine or seeking medical care, the maximum credit per employee is \$200 per day, for up to 10 days or 2 weeks. The payroll credit for family leave applies to leave required to be paid to employees beyond the 10 sick days, but it only covers wages paid to an employee on leave to take care of a child whose school or day care facility is closed. The family leave credit provides a maximum credit of \$200 per day, up to \$10,000 or 10 weeks. Both credits apply against the employer's portion of the Social Security taxes and cover 100% of wages required to be paid. Both credits are fully refundable. These credits have complex qualifications and reporting requirements that could change rapidly as the coronavirus outbreak develops, but it currently appears the credits may not be taken or refunded until the quarterly Form 941 is filed. Employers should implement a system for obtaining detailed documentation of the times and reasons employees are absent due to coronavirus.
- Establishes comparable sick leave and family leave income tax credits for self-employed workers, to cover the same coronavirus-related circumstances, days of leave, and wage amounts as an employer credits. The self-employed tax credits are also 100% refundable.
- Provides the Treasury with broad authority to issue rules and guidance, including to help businesses manage cash flow to meet the sick leave and family leave requirements.

NC Executive Order 118

- Effective March 17, 2020.
- Unemployment benefits are now available for employees who, as a result of COVID-19, are separated from employment, have had their hours of employment reduced, or are prevented from working due to a medical condition caused by COVID-19 or due to communicable disease control measures.
- Employers' accounts will not be charged for payments made due to COVID-19 claims.
- For as long as the Declaration of a State of Emergency regarding COVID-19 remains in effect, the following requirements for unemployment benefits will be waived:
 1. the one-week waiting period
 2. the "able to work" and "available to work" requirements
 3. the work search requirements
 4. the actively seeking work requirements
 5. the "lack of work" requirements
- Reducing hours (even to zero) may be a way that employers can allow their employees to obtain unemployment benefits and continue health benefits. However, employers should check with their insurance carriers concerning "actively at work" limitations in their policies.

Reduced Hours/Work at Home Issues

- For employers with 15 or more employees, allowing an infected or quarantined employee to work at home may be a reasonable accommodation under the ADA if this does not create an undue hardship for the employer. However, this analysis should not be required for employees who are laid off or have their hours reduced due to lack of work or mandated closures.
- Employees who work from home must track their hours and be paid for all hours worked.
- Under normal circumstances, exempt employees who perform any work during a given work-week must be paid their full salary for that week. However, where exempt employees will be working a reduced schedule, the employer and employee can prospectively agree that for the duration of the reduced schedule the employee will be paid on an hourly basis for hours actually worked rather than a salary. Of course, if the employee were to then work more than 40 hours in a given week, the hours over 40 would have to be paid at time and a half the regular rate.

If you have any questions regarding this client alert or any other employment or benefits questions, please contact either [Scott Dillon](tel:3364781119) at (336) 478-1119 or jsd@crlaw.com; or [Ken Keller](tel:3364781125) at (336) 478-1125 or krk@crlaw.com.