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Via E-Mail: pmiller2@uwf.edu and mnutial@uwf.edu

Paul Miller

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Northwest Florida Manufacturers Council

212 Church Street

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Re: Families First Coronavirus Response Act (the “Families First Act”)

Dear Council Members:

I hope you are doing well. As you may have heard that last Wednesday, Congress enacted a law that applies to most employers with fewer than 500 employees requiring paid, protected leave time for employees needing time off for specific reasons related to the coronavirus pandemic. This law is called the Families First Coronavirus Response Act (the “Families First Act”).

I have prepared the following Q&A on the paid leave provisions of the Families First Act. There is still some uncertainty with such a brand new law, so this preliminary review may be subject to change when the regulations are issued, which should be sometime in April. The Department of Labor is currently seeking online comments from the public about this law to assist them in developing regulations.

Does this law apply to my company?

Generally, this law applies to employers with fewer than 500 employees, that is, from 1 to 499 employees.

Although the new law does not specifically address this question, there may be some companies which are so interrelated with one another so as to permit the employees of multiple companies to be counted together for purposes of determining if the 500 employee threshold is met. Such employers should keep in mind that there may be subsequent legislation that specifically addresses employers with over 500 employees.

When will this law take effect?

The law is set to go into effect on April 1, 2020.

Re: Families First Coronavirus Response Act (the “Families First Act”)

What new leave does the law require?

There are two separate paid leave provisions in the law:

The Emergency Paid Sick Leave Act requires the payment of 2 weeks’ paid leave for specified reasons, either at full pay or 2/3rds pay depending on the reason for the absence. The paid sick leave is required to be paid at full regular pay (subject to statutory maximums described below) if an employee cannot work (or telework) because of a need to quarantine or is experiencing COVID-19 symptoms and is seeking medical diagnosis. The paid sick leave is to be paid at 2/3rds pay (subject to statutory maximums described below) if the employee cannot work (or telework) due to caring for someone who has to be quarantined due to COVID-19 or because the employee’s normal child care is unavailable due to COVID-19.

The Family and Medical Leave Expansion Act is an amendment to the Family and Medical Leave Act, where employees who cannot work (or telework) because their child care is unavailable due to COVID-19 may have up to 12 weeks of job-protected leave. After the first 10 days of this leave, the employer is required to pay the employee 2/3rds of their regular pay (subject to statutory maximums described below) for the remainder of the 12 weeks.

How does the employer pay for these new paid leave requirements?

The law allows employers to obtain a 100% payroll tax credit up to the statutory maximums.

How long does an employee have to be working for an employer to be eligible for the 2 weeks’ paid sick leave under this law?

Employees are eligible for the 2 weeks’ sick leave immediately upon hire.

Is the eligibility period different for the 12 weeks leave under the amended FMLA?

Yes. In order to be eligible for the 12 weeks’ leave due to the absence of child care related to the coronavirus, the employee must have worked at least 30 calendar days with the employer.

May an employer substitute its existing PTO or other paid leave benefits for the paid leave under the new law?

Re: Families First Coronavirus Response Act (the “Families First Act”)

No. The payments required by the new law are in addition to whatever paid leave benefits the employer may offer its employees. For example, if an employee with 5 days of accrued sick leave needs to miss work because she is quarantined for the virus, she will first be paid the 2 weeks’ sick leave pay under this law prior to using her regular sick leave pay bank.

What are the statutory maximums for the 2 weeks’ paid sick leave?

The following reasons for absence from work qualify the employee for full, regular pay up to a maximum of \$511 per day and \$5,110 total per employee:

- (1) the employee is quarantined or isolated because of a government directive order related to COVID-19
- (2) the employee has been advised by a health care provider to self-quarantine related to COVID-19
- (3) the employee is seeking a medical diagnosis and is experiencing symptoms of COVID-19

The following reasons qualify the employee for 2/3rds regular pay up to a maximum of \$200 per day and \$2,000 total per employee:

- (4) the employee is caring for someone who is quarantined or isolated due to government order or advisement of a health care provider
- (5) the employee’s child under 18 years of age needs to be cared for because the child’s school or place of care is closed, or the child care provider is unavailable, due to COVID-19
- (6) the employee is experiencing some other substantially similar condition that the government may identify later

How is the pay rate for the sick leave to be determined?

For full time employees, 2 weeks’ pay is considered 80 hours. For part time employees, 2 weeks’ pay is considered the number of hours worked by the employee in a 2 week period. For employees whose schedules vary so much that it is difficult to know how many hours they are missing at work, employers are to calculate the average hours worked per day over the previous 6 months. If the employee did not work during the previous 6 months such as in the case of a new employee, the employer is to calculate the hours based on the reasonable expectation of the employee at the time of hiring.

Is unused paid leave under this law payable to the employee upon termination?

Re: Families First Coronavirus Response Act (the “Families First Act”)

No. Unused paid leave under this law is not payable to the employee and does not carry over into 2021.

Can I ask that employees find their replacement for their scheduled shift if they ask for this paid sick leave?

No.

What documentation can I require an employee to provide?

The new law does not address the documentation that an employer may require of any employee. The employee should not be required to provide documentation prior to taking the time off, however. The regulations may address this issue. In the meantime, employers should err on the side of granting the leave.

Are there any jobs that are excluded from the 2 weeks’ paid leave requirement?

The new law authorizes the Department of Labor to issue regulations excluding health care providers and emergency responders. The regulations should issue within 7 days of the law being signed by the President.

Do employers have to post a notice about the 2 weeks’ paid leave under this law?

Yes. The Department of Labor is preparing a notice for employers to post that should be available as early as March 25.

Can an employee sue the company if the paid sick leave is not paid or if the employer retaliates against the employee for seeking or taking this leave?

Yes. An employee can sue an employer for a violation or because of employer retaliation. The Department of Labor can also pursue action against the employer. Remedies could include back pay, liquidated damages, attorney’s fees, costs, and injunctive relief.

Unlike the 2 week paid sick leave provision, is there only one reason for an employee to take the amended FMLA leave?

Yes. Although there are multiple reasons an employee may be entitled to the 2 weeks’ paid sick leave, the Family and Medical Leave Expansion Act identifies only one reason: an employee’s inability to work (or telework) to care for a son or daughter under

Re: Families First Coronavirus Response Act (the “Families First Act”)

18 years of age if the school or place of care for the child has been closed due to the COVID-19 public health emergency or if the child care provider for the child is unavailable due to the COVID-19 public health emergency.

What part of the 12 weeks’ leave is required to be paid?

After the first 10 days on the leave, the employer is required to pay the employee at least 2/3rds of their regular pay up to \$200 per day and \$10,000 total per employee. This pay requirement will extend until the employee’s place of care for the child is reopened or made available again, or at the expiration of the 12 week period. Similar to the 2 weeks’ paid sick leave provision, the law allows employers to receive a payroll tax credit for 100% of the payments made to employees while on this leave up to the \$200 per day and \$10,000 total.

While on this expanded FMLA leave due to a child care issue related to COVID-19, remember that employers will also be required to pay the employee the 2 weeks’ paid leave under the Emergency Paid Sick Leave Act discussed above, unless for some reason the employee exhausted the 2 weeks’ paid leave for a different reason (such as being quarantined) prior to needing time off for the child care issue.

Also, keep in mind that if an employee who is exempt from the overtime requirements of the Fair Labor Standards Act works during any part of the work week, the exempt employee should generally be paid her salary for the week. For example, if a supervisor works Monday through Wednesday and then takes off time off starting Thursday due to a need to care for a child whose school is closed due to the coronavirus, the supervisor will likely need to be paid her regular salary for the entire week with no deductions for missing Thursday and Friday.

If the employer has an existing paid leave program, how do these benefits relate to the expanded FMLA leave?

During the first 10 days, employees may choose to use any available PTO or other paid leave benefits that their employer may offer as part of their regular policies. However, an employer cannot require an employee to use PTO or other company-offered paid leave benefits during the first 10 days of the leave.

The law is silent on an employee’s use of existing employer-offered paid leave benefits after the first 10 days. I am hopeful that the regulations will address this question.

Re: Families First Coronavirus Response Act (the “Families First Act”)

Is the leave taken by an employee under the expanded FMLA in addition to an employee’s regular FMLA leave entitlement?

Not likely. Based on how this new law fits within the FMLA, for employers who employ 50 or more employees and are regularly covered under the FMLA, the 12 week period for this leave should not be in addition to the FMLA leave available to eligible employees for other FMLA leave reasons. In other words, if an employee has already used his entire allotment of FMLA leave before seeking additional leave due to loss of child care related to the coronavirus, the employer is likely not required to provide additional leave under this law.

The FMLA does not normally apply to employers with fewer than 50 employees. Are there special provisions in this new law for employers with fewer than 50 employees?

Yes.

For employers who employ fewer than 50 employees, the law authorizes the Department of Labor to issue regulations that would exempt them from these leave requirements “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” As of this time, no regulations have been issued. The law appears to place the burden on the employer to prove that allowing the paid leave would jeopardize the employer’s business, which could be an expensive burden in litigation that would open the company’s financials to scrutiny. The cost to defend claims on this issue may never be recovered. Therefore, employers should carefully consider whether to not follow the paid leave requirements of this new law.

For employers with fewer than 50 employees, there is no private cause of action an employee can take for a violation of this law. Instead, the enforcement would come from the Department of Labor.

The leave under this law is “protected” in the sense that the employer has a general obligation to place the employee back into his job position at the conclusion of the leave. However, for employers with fewer than 25 employees, the requirement to restore the employee back to the same position does not apply if the employer can show that the employee’s job position no longer exists due to “economic conditions or other changes in operation conditions of the employer (i) that affect employment and (ii) are caused by a public health emergency during the period of the leave.” Even if these circumstances occur, the employer must be able to show that the employer made reasonable efforts to place the employee in an equivalent position, including contacting the employee for a year if an equivalent position becomes available.

Northwest Florida Manufacturers Council

March 25, 2020

Page 7

Re: Families First Coronavirus Response Act (the “Families First Act”)

Does the new law specify the type of documentation an employer can require of an employee for this expanded FMLA leave?

No. This would seem to mean that the regular FMLA documentation rules apply, which generally requires an employee to provide certification within 15 days, with allowance for a greater amount of time when circumstances warrant. Regulations may provide guidance on this issue. In many instances, the lack of child care will not be a controversial issue, such as when the employee’s children attend a local school that is closed related to the coronavirus.

What should I do if I have more questions?

Feel free to contact me with any questions. My direct dial is 850-469-3315.

Yours very truly,

/s/ Russell F. Van Sickle
Russell F. Van Sickle
For the Firm

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