



## **COVID-19 updates**

### **Congress Enacts Families First Coronavirus Response Act, Including Paid Sick Leave, Expanded FMLA Protections and Mandated COVID-19 Health Insurance Coverage**

On Wednesday, March 18, 2020, the president signed HR 6201, the Families First Coronavirus Response Act (the FFCRA), which contains several different provisions (also called Acts), which are now law. The new law will have a significant impact on employer benefits and leave policies, particularly for those employers with fewer than 500 employees.

In short, the FFCRA: 1) Provides a new paid sick leave entitlement for work absences related to the coronavirus (COVID-19); 2) extends and expands FMLA protections in certain situations; 3) provides tax credits for employers to help address related employer costs of these benefits; and 4) requires group health plans to cover COVID-19 related tests, services and other items without cost-sharing. Generally, the first three provisions apply to employers with fewer than 500 employees. They take effect April 2, 2020 (15 days after enactment), and will be in effect through 2020. The fourth applies to any group health plan, takes effect immediately, and will expire when HHS determines that the public health emergency has expired. Importantly, the paid sick leave and expansions to FMLA do not apply to employers with 500 or more employees. Below is a description of these FFCRA provisions.

#### **Emergency Paid Sick Leave Act:**

This provision applies to employers with fewer than 500 employees and requires employers to provide up to 80 hours of paid sick time to individuals who are: Diagnosed with COVID-19, self-isolating or obtaining a diagnosis/care for COVID-19 symptoms Under quarantine to comply with an official order or recommendation because of

COVID-19 exposure or symptoms Providing care to a COVID-19-diagnosed individual or an individual seeking a diagnosis or care for symptoms of COVID-19 Caring for an individual affected by a school or other care facility closing Experiencing similar conditions specified by HHS (in consultation with the DOL and Treasury) This applies to all employees (regardless of how long they've been employed). Full-time employees may use up to 80 hours of sick time, while part-time employees may use proportionally less time, based on the average number of hours the employee works over a two-week period. An employee may not carry this sick time over into the next year, nor is an employee entitled to payment of unused sick time upon separation from employment. Emergency paid sick leave does not diminish the rights and benefits to which an employee is entitled under state or local law (such as a state sick leave or paid family and medical leave law), a collective bargaining agreement or an existing employer leave policy.

During sick leave relating to an employee's own condition, employers are obligated to pay employees the higher of their regular rate of pay or the applicable minimum wage. That amount is capped at \$511 per day and \$5,110 in the aggregate. For sick leave taken to care for a family member, the rate of pay is reduced to two-thirds of the employee's regular rate of pay. That amount is capped at \$200 per day and \$2,000 in the aggregate.

Employers must post in their workplaces a notice relating to the Emergency Paid Sick Leave Act (the DOL is required to publish a model notice within seven days).

To help employers shoulder the financial burden, employers can claim a tax credit equal to 100% of qualified sick leave wages paid to employees. These credits, however, are limited to \$200 or \$511 per day, depending on the qualifying leave event. Employers can claim a full credit for employees earning up to \$132,860 in income and a partial credit for higher earners.

## **The Emergency Family and Medical Leave Expansion Act:**

This provision modifies the Family and Medical Leave Act (FMLA) by expanding the circumstances under which an employee is entitled to take leave. Specifically, employees can take FMLA-protected leave if they have a “qualifying need,” which means the employee is unable to work or telework due to a need to care for their child (age 18 or younger) if the child’s school or daycare has closed because of a public health emergency (defined as a COVID-19 emergency declared by a federal, state or local authority). The first 10 days of this expanded FMLA leave is unpaid, although the employee may utilize accrued vacation, PTO or sick leave during that time (in accordance with the employer’s leave policy). During the first 10 days, the employee may also qualify for paid leave under the above Emergency Paid Sick Leave Act (which would overlap), in certain circumstances. For each day of FMLA leave taken thereafter, employers are obligated to pay employees at the rate of two-thirds of the employee’s regular pay rate. The amount of paid leave is capped at \$200 per day and \$10,000 in the aggregate.

Importantly, all employers with fewer than 500 employees must comply with the expanded leave entitlements (a change to the 50-employee threshold that currently applies under FMLA). That said, the law gives the DOL authority to exempt employers with fewer than 50 employees if the paid FMLA provisions would jeopardize the viability of the business. Also, while not directly addressed in the new law, it appears that the general FMLA rules for counting employees would apply; if separate business entities (separate EINs or business lines) have different management and separate operations, then the entity would count employees separately from the bigger controlled group of entities — employers should work with counsel to be sure. Additionally, any employee who has been employed for at least 30 calendar days would be eligible for the expanded leave (but there are exceptions for employers that are experiencing economic hardship and employ fewer than 25 employees — we assume the DOL will further clarify that via regulations). Finally, the job protection requirements of the FMLA would also apply to COVID-19-related leaves (meaning employers must reinstate employees

after their FMLA period ends), although there are some exceptions for employers with fewer than 25 employees.

To help with the expanded FMLA-related tax burden, employers may claim a tax credit of 100% of qualified FMLA wages paid to employees, capped at \$200 per day and \$10,000 per quarter per employee.

### **Mandated COVID-19 Coverage for Employer-Sponsored Group Health Plans:**

Under this provision, group health plans of any size (insured and self-insured, including grandfathered plans) and health insurers in the group and individual market are required to cover COVID-19 tests and related services without cost sharing or prior authorization requirements. Excepted benefits and retiree-only plans are exempt. (Separately, most states have published guidance that requires COVID-19 coverage without cost sharing as well, which would apply to fully insured plans in each state.) Employers should work with their carriers and plan administrators to ensure COVID-19 coverage is provided.

The tests and services include in vitro diagnostic tests (cleared by the FDA) and items and services furnished during an in-office visit, urgent care visit or emergency room visit that result in an order for an in vitro diagnostic test. Thus, an individual visiting an ER who is given several lab tests, an MRI and a chest x-ray may be swept into this “no cost” requirement as there is no qualifier that the other items and services relate to the relevant evaluation.

As these issues are rapidly developing, NFP Benefits Compliance will continue to monitor developments on this new legislation, including any additional guidance issued by the DOL or other regulatory agency. In the meantime, please reach out to your NFP advisor with any questions.