

Expiration of Families First Coronavirus Response Act Paid Leave Provisions December 29, 2020

The federal Families First Coronavirus Response Act (“FFCRA”), passed on March 18, 2020, included certain paid leave provisions for Emergency Paid Sick Leave (“EPSL”) and Expanded Family and Medical Act Leave (“EFMLA”). These paid leave provisions, effective April 1, 2020, are set to expire by the FFCRA’s own terms on December 31, 2020. Accordingly, beginning January 1, 2021, public employers will no longer be required to provide EPSL and EFMLA under FFCRA, and may apply their existing leave policies or otherwise update their policies accordingly.

Under the FFCRA, most employees have been eligible for additional paid sick leave if they were unable to work for several specific reasons enumerated in the FFCRA itself:

- (1) the employee is subject to a COVID-19-related quarantine or isolation order at the Federal, State, or local level;
- (2) a health care provider has advised the employee to self-quarantine due to COVID-19 concerns;
- (3) the employee is experiencing COVID-19 symptoms and seeking a diagnosis;
- (4) the employee is caring for an individual subject to the order or advice described above;
- (5) the employee is caring for a child due to COVID-19-related school closure or professional child care provider unavailability; or
- (6) the employee is experiencing other substantially similar conditions specified by the Secretary of Health and Human Services.

Similarly, the FFCRA amended the Family and Medical Leave Act (“FMLA”) temporarily, so that an employee’s need for leave to care for a child due to COVID-19-related school closure or professional child care provider unavailability constituted a qualifying reason for leave under the FMLA. Employees taking leave under the FMLA for this particular reason are entitled to pay, albeit at a reduced rate, in some circumstances.

As the December 31, 2020 expiration date of the FFCRA’s paid leave provisions approaches, there has been no state or federal legislation extending the requirement that employers continue to provide the paid leave under the terms of the FFCRA. Congress’ latest stimulus package, a nearly 6,000-page bill called the “Consolidated Appropriations Act, 2021” (“Stimulus Bill”), and signed into law December 28, 2020, does not change the FFCRA’s original December 31, 2020, expiration date. The Stimulus Bill does state that employers who continue to provide leave authorized by the FFCRA after the December 31, 2020, expiration date will be eligible for certain tax credits provided by the FFCRA for those leave payments until March 31, 2021. Critically, however, as we have previously advised, the tax credits established by the FFCRA do not apply to municipal governments as subdivisions of the

Commonwealth, nor to any agencies or instrumentalities of such state or local governments. The Stimulus Bill does not include any language changing employer eligibility for these tax credits, and therefore the extension of their availability to March 31, 2021, does not affect municipal or other government employers, who remain unable to claim this tax credit.

Accordingly, effective January 1, 2021, employers are not required to provide EPSL or EFMLA to employees for any of the above-stated reasons, regardless of whether or not they used their full FFCRA leave allotment between April 1 and December 31, 2020. Moreover, where an employee has not used all of the EPSL and/or EFMLA to which they were entitled between April 1 and December 31, 2020, the employer is not obligated to provide, and the employee is not entitled to receive, any reimbursement, buy-out, or other financial compensation for whatever unused paid leave exists on the December 31, 2020, expiration date. Please note, the amendments to the FMLA providing that COVID-19-related school closure constitutes an FMLA-qualifying reason for leave will also expire; employees who need leave due exclusively to childcare issues related to COVID-19 will not be eligible for FMLA leave on that basis effective January 1, 2021. Employees who cannot work and are seeking leave due to their childcare obligations must use their own accrued leave or other leave provided by the employer pursuant to the terms of the employer's respective policies or relevant collective bargaining agreements.

Employers may choose to provide leave under terms similar to those provided under the FFCRA, or adopt a similar policy to address situations that may arise where a basis for leave that would have been covered under the FFCRA is not addressed by the employer's existing policies. However, please be advised that in a situation like this, where a benefit required by statute is set to expire, an employer who wishes to extend that benefit beyond the date of its expiration would be obligated to bargain with affected unions over the extension of that benefit, since an extension of previously-required benefits arguably constitutes a change in working conditions.

Accordingly, going forward beginning on January 1, 2021, public employers are advised to provide leave according to their normal leave policies or update their policies as discussed in this memorandum.

If you have any questions concerning the FFCRA, specifically with respect to Emergency Paid Sick Leave or Expanded Family and Medical Leave Act Leave, contact any member of the firm's Labor and Employment Practice Group at 617.556.0007.

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