Coronavirus Legislation Includes Mandatory Paid Leave and Payroll Tax Credits

On March 18, the president signed into law the *Families First Coronavirus Response Act* to provide for COVID-19-related emergency supplemental appropriations for the fiscal year ending Sept. 30, 2020, and various relief beyond this date. The bill was enacted into law immediately after the Senate voted on it. The final law largely is similar to the House bill released on March 14, 2020, but includes technical corrections that in some cases are substantive. The summary that follows relates to aspects of the legislation that might affect employers.

First-dollar coverage for coronavirus testing

The legislation requires employer group health plans (self-funded and insured) to provide coverage and prohibits imposition of cost sharing (including deductibles, copayments, and coinsurance) or prior authorization or other medical management requirements for certain items and services furnished during the defined emergency period beginning on or after March 18, 2020. These items and services include testing for the virus that causes COVID-19 and related in vitro diagnostic products, as well as items and services furnished during healthcare provider office visits (in-person and telehealth), urgent care center visits, and emergency room visits that result in need for such testing and diagnostic products.

This first-dollar coverage doesn't extend to medical services after testing or diagnosis. The legislation authorizes tri-agency – that is, the U.S. Department of Health and Human Services (HHS), the U.S. Department of the Treasury, and the U.S. Department of Labor (DOL) – enforcement of the provision, as well as implementation through subregulatory guidance, program instruction, or otherwise.

Two types of mandated paid leave and related payroll tax credits

There are three components to the paid leave requirements of the legislation that apply to nongovernmental employers with fewer than 500 employees and to government employers:

1. The first component obligates employers to provide COVID-19-related *Family and Medical Leave Act of 1993* (FMLA) protections and paid FMLA leave.
2. The second component obligates employers to provide COVID-19 emergency paid sick leave.
3. The third component permits employers to claim payroll tax credits for each type of mandated paid leave, subject to certain caps.

Emergency family and medical leave and paid FMLA leave

The *Emergency Family and Medical Leave Expansion Act* (EFMLEA) applies protections under the FMLA for leave related to COVID-19 as a "qualifying need related to a public health emergency" and, for the first time, requires specified related paid FMLA leave.

These new requirements apply to employers generally having fewer than 500 employees and to government employers for employees who have been employed at least 30 calendar days and have a qualifying need. The new requirements will apply from a date to be specified within 15 days after enactment until Dec. 31, 2020.

A qualifying need exists if an employee is unable to engage in employment (including telework) due to a need to care for a son or daughter under age 18 if the child's school or place of care has been closed or a child care provider is unavailable due to a COVID-19 declared public health emergency. Certain definitions are provided (such as "school" and "child care provider").

Affected employees are entitled to up to 12 weeks of job-protected leave and the job-related protections (including against discrimination and retaliation) that otherwise apply to leave protected under the FMLA.

There is no requirement for paid FMLA leave for the first 10 days that an employee takes such leave (but emergency paid sick leave may apply). An employee cannot be required to substitute any accrued leave (vacation, personal, medical, or sick leave) for such unpaid leave. After the first 10 days and for the remainder of the 12 weeks, the employer must provide paid leave to the employee at two-thirds of the employee's regular rate of pay. The final bill adds that the paid leave cannot exceed $200 per day and $10,000 in the aggregate for each employee.

Rules are provided for employees with variable schedules, for employees under collective bargaining agreements, and for potential exceptions. The final bill permits an employer to elect to exclude from the requirements employees who are healthcare workers or emergency responders. Additionally, the DOL is authorized to issue regulations for good cause to exclude from the requirements certain healthcare providers and emergency workers and any business with fewer than 50 employees if the requirements would jeopardize the viability of the business as a going concern.

Emergency paid sick leave

The *Emergency Paid Sick Leave Act* (EPSLA) applies to employers with fewer than 500 employees and to government employers, from a date to be specified within 15 days after enactment until Dec. 31, 2020. As is the case under the EFMLEA, an employer may elect to exclude from the requirements employees who are healthcare providers or emergency responders. Unlike the EFMLEA, the EPSLA applies to employees of affected employers without regard to length of employment.

Affected employers must provide employees with 10 days of paid sick leave at a 100% rate if the employee is unable to work (or telework) due to any of the following reasons:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a healthcare provider to self-quarantine due to COVID-19-related concerns.
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

The final bill adds that the paid leave for each employee under the circumstances described cannot exceed $511 per day and $5,100 in the aggregate.

The rate of paid sick leave is reduced to two-thirds (67%) if the employee is unable to work (or telework) because any of the following apply:

- The employee must care for an individual who is subject to a quarantine or isolation order or who has been advised to self-quarantine by a healthcare provider.
- The employee must care for a son or daughter under age 18 because the child's school or place of care has been closed or a child care provider is unavailable due to COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by HHS in consultation with Treasury and the DOL.

The final bill adds that the paid leave for each employee under these caregiving circumstances or a substantially similar condition specified by HHS cannot exceed $200 per day and $2,000 in the aggregate.

The required rate of pay must be based on the employee's regular rate of pay but cannot be less than the federal or local minimum wage rate applicable to the employee. Full-time employees are entitled to such pay for 80 hours. Part-time employees are entitled to such pay based on the typical number of hours that they work in a typical two-week period. Rules are provided for employees with variable schedules and for employees under collective bargaining agreements. The DOL is required to issue guidelines within 15 days after enactment to assist employers in calculating the amount of required paid sick time.

Similar terms as those for FMLA or *Fair Labor Standards Act* (FLSA) purposes apply. An employer cannot require an employee to find a replacement employee during the sick leave or to use other paid leave before using the required emergency paid sick leave. Additionally, employers must provide a notice to employees regarding required emergency paid sick leave, and they cannot terminate or otherwise discriminate or retaliate against protected employees in connection with such leave. Violations are treated as FLSA minimum wage and antidiscrimination and nonretaliation violations and, thus, are subject to related FLSA penalties.

The DOL is authorized to issue regulations for good cause to exclude from the requirements certain healthcare providers and emergency workers and any business with fewer than 50 employees if the requirements would jeopardize the viability of the business as a going concern, as well as to carry out the legislation as necessary, including ensuring consistency between the EPSLA, EFMLEA, and related payroll tax credits.

Payroll tax credits

The legislation permits nongovernmental employers to claim a refundable tax credit for required paid FMLA leave under the EFMLEA and for required emergency sick paid leave under the EPSLA. The credit applies against the employer portion of Social Security taxes under IRC Section 3111(a) that is not otherwise reduced by credits under IRC Sections 3111(e) (for qualified veterans) and 3111(f) (for qualified small-business research expenditures). Taxes reduced by the EPSLA payroll tax credit are not also eligible for the EFMLEA payroll tax credit. IRC Section 3111(a) imposes on each employer a 6.2% Social Security tax on each employee's wages up to the *Federal Insurance Contributions Act* wage base ($137,700, indexed for 2020).

An employer can claim a credit for 100% of the tax on wages related to required paid FMLA leave under the EFMLEA. Creditable wages for each employee are capped at $200 per day and $10,000 for all calendar quarters.

An employer also can claim a credit for 100% of the tax on wages related to required emergency paid sick leave under the EPSLA. Creditable wages are capped at $511 per day for each employee who takes a sick day for him- or herself under the EPSLA. This amount is reduced to $200 per day for any employee caring for an at-risk family member or child under the qualifying conditions described in the act or who is experiencing a substantially similar condition specified by HHS. For each calendar quarter, the aggregate number of days taken into account for each employee cannot exceed 10 days and is reduced by the aggregate number of days taken into account for all preceding calendar quarters. As a result, a maximum of 10 days for each employee can be taken into account.

The final bill increases the amount of each payroll tax credit in two ways:

1. For qualified health plan expenses allocable to the wages on which the credit is based, limited to amounts paid or incurred by the employer to provide and maintain a group health plan (self-funded or insured) and allocable to a covered employee. To be qualified health expenses, such amounts also must be excludible from the employee's income. The legislation requires Treasury to prescribe allocation rules but indicates an allocation is treated as proper if made on a pro rata basis among covered employees and pro rata based on periods of coverage relative to the paid leave period.
2. By the amount of the employer portion of the Medicare taxes imposed by IRC Section 3111(b) on the relevant wages for which the credit is allowed. IRC Section 3111(a) imposes on each employer a 1.45% Medicare tax on each employee's wages.

An employer cannot deduct the amount of the relevant payroll tax credit. Any wages taken into account to determine a credit also cannot be counted for purposes of determining the paid family and medical leave credit under IRC Section 45S.

Both payroll tax credits will apply to wages paid during the period between the date selected by Treasury within 15 days after enactment and Dec. 31, 2020. (Note: Similar credits apply to the equivalent portion of self-employment tax for qualifying self-employed individuals.)

Looking ahead

The legislation creates a tax credit "off code" (meaning that the IRC itself was not amended) and also permits the tax credit based on mandated paid leave under non-IRC laws (the FMLA and the FLSA). For example, both types of mandated paid leave use a definition of "employer" and "employee" under the applicable non-IRC law. At the same time, the payroll tax credit provisions refer generally to tax law definitions. As a result, there might be technical challenges in determining – for tax purposes – how the payroll tax credits apply to an employer or business, and to which of its employees, when the non-IRC and IRC definitions do not align. The legislation requires Treasury and the IRS to issue "regulations or other guidance to ensure that the wages taken into account … conform with paid sick leave time required to be provided" under the EFMLEA and the EPSLA. Until guidance is issued to provide the details of how to meet the law's requirements and claim payroll tax credits, employers should work with their advisers to determine whether they are subject to the new law, and, if so, to consider processes to implement and document compliance.

Contact:

Veena K. Murthy, Principal
202-552-8015
veena.murthy@crowe.com