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Locke Lord QuickStudy: UPDATE On The Families First Coronavirus Response Act ??(FFCRA) Leave Protections Following Enactment of Consolidated Appropriations Act, 2021?

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UPDATE: On December 21, 2020, Congress passed the Consolidated Appropriations Act, 2021 ??[Including Coronavirus Stimulus & Relief]. On December 27, 2020, President Trump signed this ?legislation into law.

?This bill extends the tax credits associated with the Families First Coronavirus Response Act (FFCRA), including the Public Health Emergency Leave and Emergency Paid Sick Leave through March 31, 2021. While the tax credits aspect of the FFCRA has been amended, the actual employer mandates do not appear to have been extended beyond the December 31, 2020, expiration date. Thus, employers may continue to extend the benefits to their employees and may qualify for tax credits, though doing so would be permissive and not mandatory.

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On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA), ?into law. The FFCRA includes two major overhauls to leave programs for employers – the ?amendment of the Family and Medical Leave Act (FMLA) to add new Public Health Emergency ?Leave and the enactment of Emergency Paid Sick Leave for reasons related to the Coronavirus.?

Since the law was signed, the U.S. Department of Labor (DOL) has published frequently-updated ?guidance to clarify various aspects of the laws, most recently on April 3, 2020. The guidance clarifies, ?among other things, that these two programs are effective as of April 1, 2020, and run through ?December 31, 2020. The DOL guidance also indicates that neither of the new leave programs are ?retroactive, i.e., they apply only to leave taken between April 1, 2020, and December 31, 2020 [It is anticipated that this guidance will be amended to reflect the new March 31, 2021, cutoff reflected in the Consolidated Appropriations Act, 2021], and ?do not apply to furloughed employees. Moreover, the DOL offered guidance concerning how ?corporations and other entities operating as enterprises or integrated employers should count ?employees for purposes of the under- 500-employee coverage threshold. On Wednesday, April 1, ??2020, the DOL issued regulations at 29 C.F.R. Part 826 implementing the FFCRA's paid leave laws, ?which are consistent with its previous guidance.??

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Additionally, the DOL has issued a model poster that covered workplaces must post, as well as an ?FAQ related to the poster. A separate poster is available for federal workplaces.?

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act ??(the "CARES Act") into law, which amends portions of the FFCRA in addition to the Bill's other ?provisions. These amendments are discussed below.?

On Thursday, April 1, 2020—the same day the DOL issued the FFCRA regulations—the ranking ?member of the Senate Committee on Health, Education, Labor and Pensions and the chair of the ?House Appropriations Subcommittee responsible for funding the Department of Labor issued a letter to the DOL condemning the DOL's interpretation of certain provisions of the FFCRA, and ?requesting that the DOL revise its guidance as contradicting the plain language of the FFCRA and ?violating congressional intent. Although the letter was issued prior to release of the DOL ?regulations, the positions contained therein signal that Congress disagrees with material aspects of ?the regulations.?

The following updates our prior QuickStudy and addresses some of the many issues that these new ?leave laws raise. For purposes of this discussion, points made in the Congressional letter will refer to ??"Congress" and points made in the DOL guidance and regulations refer to the "DOL." We will continue to update this article as additional guidance and/or regulations become available.?

FFCRA Amends FMLA to Add "Public Health Emergency Leave"

The FFCRA entails a significant expansion to the federal Family and Medical Leave Act (FMLA) for Coronavirus-related reasons. Notably, the law adds Public Health Emergency Leave provisions subject to separate rules and requirements.

Unique Coverage for Public Health Emergency Leave

The Public Health Emergency Leave applies to all employers with fewer than 500 employees. This criteria is different from the FMLA's usual coverage threshold, i.e., a 50 employee minimum. Employees on leave, temporary employees jointly employed by one or more companies (regardless of where the jointly-employed employees are housed for payroll purposes), and day laborers supplied by a temporary agency are also counted toward the leave coverage limit.

A corporation, including its separate establishments or divisions, is considered to be a single employer and its employees should be each counted toward the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers as defined in the Fair Labor Standards Act (FLSA) with respect to certain employees. If two entities are deemed joint employers, all of their common employees must be counted in determining whether Public Health Emergency Leave applies. If two or more entities satisfy the integrated employer test under the FMLA, then all employees of all entities making up the integrated employer will be counted in determining employer coverage for Public Health Emergency Leave.

Employers that are signatories to a multi-employer collective bargaining agreements may find some relief from this amendment if they make contributions to a multiemployer fund, plan, or program based on the paid leave entitlements to which employees would otherwise be entitled.

There is also some relief for smaller employers and employers in the health care industry. The amended FMLA and subsequent guidance from the DOL permits employers of certain health care providers and emergency responders to exclude those employees from eligibility for Public Health Emergency Leave.

The DOL has clarified that the term "health care provider" is broad. A health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

Congress, on the other hand, disagrees with the DOL's broad definition, stating in its recent letter that the DOL's definition improperly deviates from the narrow definition provided by Congress in the FMLA. Instead, Congress states, the employee cannot merely be an employee of a health care provider but must, in fact, be a health care provider as defined by the FMLA, 29 U.S.C. § 2611.

Similarly, an "emergency responder" is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

The amended FMLA and subsequent DOL guidance also exempt small businesses with fewer than 50 employees if the obligations would jeopardize the viability of the business as a going concern. The DOL guidance provides that an employer, including a religious or nonprofit organization, with fewer than 50 employees is exempt from providing Public Health Emergency Leave (or paid sick leave under the Sick Leave Act, discussed below) due to school or place of care closures or child care provider unavailability for COVID-19 related reasons if an authorized

officer of the business has determined that:

1. The provision of paid sick leave or Public Health Emergency Leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or Public Health Emergency Leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or Public Health Emergency Leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Employers who otherwise are encompassed by the expanded coverage of the amended FMLA are not subject to enforcement actions by employees unless they also meet the FMLA's current definition of a covered employer. Thus, it appears any enforcement action would primarily be pursued by the DOL.

Furthermore, in a March 20, 2020, joint press release by the U.S. Internal Revenue Service (IRS), DOL, and Department of Treasury, and in subsequent guidance, the DOL stated that it will be issuing a 30-day non-enforcement moratorium that provides a period of time for employers to come into compliance with the act. Thus, for the first 30-days that the law is enacted, the DOL will not bring an enforcement action against any employer for violations of the FFCRA so long as the employer has acted reasonably and in good faith to comply with the act. In its most recent guidance, the DOL clarified that the 30-day moratorium will run from March 18 through April 17, 2020. After April 17, 2020, the stay of enforcement will be lifted and the DOL will fully enforce violations of the FCCRA. At that point, the DOL will retroactively enforce violations back until the effective date of April 1 if employers have not since remedied any violations.

According to a March 24, 2020, memorandum from the DOL Wage and Hour Division, an employer in violation of the FFCRA acts reasonably and in "good faith" when: (1) the employer remedies any violations, including by making all affected employees whole, as soon as practicable; (2) the violations were not "willful" (i.e., the employer did not know or show reckless disregard for the matter of whether its conduct was prohibited); and (3) the DOL receives a written commitment from the employer to comply with the FFCRA in the future.

Relaxed Eligibility Requirements for Employees

Ordinarily, employees must work at least 1,250 hours and at least 12 consecutive months to be eligible for FMLA leave. The Public Health Emergency Leave expands coverage to employees who have been employed with that employer for at least 30 days. The CARES Act further relaxes the 30-day requirement, providing that employees who were laid off after March 1, 2020, but later rehired would be eligible for paid family leave under the amended FMLA if the employee worked for the employer for 30 days or more of the last 60 calendar days prior to their layoff.

In order to qualify for Public Health Emergency Leave, an employee must have a qualifying need related to an emergency declared by a federal, state, or local authority with respect to COVID-19. To establish a

qualifying need, the employee must be unable to work (or telework) because he or she needs to care for his or her minor child if the child's elementary or secondary school or place of care has been closed, or if the child's regular paid care provider is unavailable, because of an emergency declared by a federal, state, or local authority with respect to the coronavirus. Additionally, employers of health care providers or emergency responders may decline to offer Public Health Emergency Leave to those employees.

The DOL guidance and regulations dictate that employers are authorized to obtain (and should retain) documentation from employees sufficient to support requests for leave to the extent permitted under certification rules for conventional FMLA leave requests and as specified in applicable IRS forms, instructions, and information for tax credits under the FFCRA. The DOL and IRS will require documentation of the reason for leave where a tax credit is requested. To date, however, the IRS has not yet released any such certification forms to provide guidance on the documentation to be collected. The DOL further permits employers to require workers to provide additional documentation in support of Public Health Emergency Leave, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed from an employee or official of the school, place of care, or child care provider. Where materials sufficient to support the applicable tax credit have not been provided by an employee, the DOL's recently-updated guidance indicates employers are not required to provide leave.

In response to this guidance, Congress has stated that the DOL has impermissibly expanded the documentation and certification requirements of the FMLA. That is, the FFCRA does not allow employers to require documentation of the need for leave beyond what is already permitted by the FMLA, and employers may not condition employee leave on what the IRS decides to require in terms of employer documentation for the refundable tax credit. Congress urges that the DOL guidance (and, presumably, regulations) thwart the purpose of the law, which is to ensure employees are able to use their newly-guaranteed paid sick and family leave during the COVID-19 pandemic in order to slow the spread of the disease, and thereby alleviating the burden on the healthcare system imposed by employees seeking doctor certifications.

Ultimately, due to the disagreement between Congress and the DOL, it is currently unclear what, if any, documentation may be requested or required by an employer in support of Public Health Emergency Leave.

The DOL guidance further provides that the ability to telework may be a key factor in evaluating an employee's ability to take leave under the amended FMLA. Even where telework is offered by an employer, the DOL has recognized that employees may nonetheless become unable to telework for qualifying reasons. Thus, employers should communicate openly with their employees to determine leave eligibility.

The DOL guidance indicates that both parents may not take simultaneous leave because childcare is not unavailable. However, the DOL guidance further indicates employees may take intermittent leave to care for a child whose school is closed or where childcare is unavailable due to the coronavirus. Where the employee is teleworking, intermittent leave may be taken in any increment agreed to between the employer and employee (e.g., hour or hour and a half increments). The DOL guidance and regulations provide that, where employees are not teleworking, intermittent leave must be taken in full-day increments. Congress, however, disagrees, citing to the express language of FFCRA, which imposes no such restriction or minimum increment on intermittent leave.

The DOL's guidance has also clarified that Public Health Emergency Leave benefits under the amended FMLA and paid sick leave benefits under the Sick Leave Act are limited when an employer is forced to shut down or when it furloughs employees. For example, an employer does not need to provide these benefits to its employees if it closes before April 1, 2020 (the effective date of the FFCRA) due to lack of business or pursuant to a Federal, State, or local directive. Similarly, an employer who closes after April 1, 2020, does not need to provide these paid benefits to employees who have not already gone out on leave. Where an employee is already on paid sick leave or Public Health Emergency Leave, an employer must pay for any paid sick leave or Public Health Emergency Leave used by the employee up to the time of the closure.

The DOL guidance also provides that employees are not entitled to take paid sick leave or Public Health Emergency Leave during a furlough caused by lack of work or business, even if the employer plans to reopen in the future. Similarly, if an employer has reduced (not eliminated) an employee's hours due to lack of work or business, the employee may not use these paid leave programs for the hours he or she is no longer scheduled to work.

Congress has taken issue with the DOL's guidance, noting that nothing in the FFCRA permits employers to cut off employees' rights to paid sick or family leave by reducing hours, furloughing employees, or closing a worksite. Given the context in which the FFCRA was passed—a nationwide social distancing directive with several statewide shelter in place orders in effect—Congress urges that its intent was to allow such workers to qualify for paid leave in those circumstances. Consistent with this broader construction, Congress has stated that the paid leave requirements attach to any employee "unable to work" due to a qualifying reason under the FFCRA, and does not hinge on an employer's ability to provide work to the employee. Notably, Congress acknowledges that employers may shut down entirely and permanently lay off employees, suggesting this is the only way to avoid the FFCRA paid leave requirements.

In an apparent effort to resolve existing confusion regarding the application of the FFCRA to workers impacted by shelter in place and safer at home orders, Congress has stated that the only reasonable conclusion of both the FFCRA's text and congressional intent is for the FFCRA to encompass such orders. Congress has expressed disapproval of the DOL's suggestion that an employer's closing of its worksite due to such a directive relieves it of providing paid sick or family leave under the FFCRA. Ultimately, however, disagreement between the DOL and Congress leaves unanswered the question of whether shelter in place or safer at home orders entitle affected employees to sick or family leave under the FFCRA.

No Additional FMLA Time Created by the FFCRA

Though the FFCRA amends the FMLA in several material respects, it does not expressly add additional job-protected leave time. Employees who take Public Health Emergency Leave will be eligible for the same amount of FMLA leave (12 weeks) as employees who take leave for other FMLA-covered reasons. The DOL has clarified that an employee who has taken (or exhausted FMLA leave for reasons other than Public Health Emergency Leave in the preceding leave year will have reduced (or no) leave time under the FMLA for a Public Health Emergency. Similarly, employees who use some or all of their allotted Public Health Emergency Leave will have reduced (or no) leave time under the FMLA for an otherwise qualifying event within the following leave year.

Unlike typical FMLA leave, Public Health Emergency Leave also provides paid leave for any eligible leave taken after ten (10) days. Additionally, employers in states like California, with their own state- equivalents of the FMLA, face the potential of leave covered by the amended FMLA that does not exhaust leave under their state's FMLA equivalent law, unless those state laws also are amended.

Job Protection

As with typical FMLA leave, employers must restore employees to their same or a similar position upon their return from Public Health Emergency Leave. Smaller employers (25 or fewer employees) are exempt from this job protection requirement, however, if

1. the position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a coronavirus-related emergency declared by a federal, state, or local authority;
2. the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; and
3. after those reasonable efforts fail, the employer makes reasonable efforts to contact the ?employee about an equivalent position, if one becomes available, for one year following the ?conclusion of the coronavirus-related emergency or the conclusion of the 12-weeks of ?coronavirus-related leave taken by the employee, whichever is earlier.?

Pay Requirements for Public Health Emergency Leave

The amended FMLA does not require employers to pay employees taking Public Health Emergency Leave for the first ten (10) days of leave. Employees may opt to use (substitute) any accrued paid time off, vacation time, sick leave, or other paid leave during this initial period (including sick leave under the Emergency Paid Sick Leave Act below).

After the first ten (10) days of Public Health Emergency Leave, the amended FMLA requires employers ?to pay employees on such leave at a rate of two-thirds the employees' regular rate of pay (as ?determined under the Fair Labor Standards Act). The amended FMLA and CARES Act sets a cap on ?mandatory paid leave at $200 per day and $10,000 in the aggregate. ?

Guidance from the DOL and the CARES Act both make clear that employers may choose to pay employees more than the mandated cap. Employers may also allow—and even require—employees to use employer- provided leave to run concurrently with their paid FMLA leave. In such a case, employers are required to pay the full amount to which an employee would be entitled under the employer's paid leave policy. Employers may not, however, receive tax credits for any leave payments exceeding the statutory cap. For employees who have exhausted their employer-provided leave, but not their normal FMLA leave, the employer will still be required to pay those employees for subsequent periods of expanded family medical leave at a rate of two-thirds the employees' regular rate of pay (capped at $200 per day and $10,000 in the aggregate).?

For employees with variable work schedules, employers are to average the employee's hours worked ?per day over the previous 6 months or, if the employee has not worked during that period of time, the ?average daily hours the employee would have been reasonably expected to be scheduled to work ?when hired. Though it is unclear from the statute, it appears an employee may be able to substitute ?paid leave for lost pay during this portion of

Public Health Emergency Leave.?

Tax Credit

Recognizing the fiscal impact of the Public Health Emergency Leave, the FFCRA provides a payroll tax credit for covered employers. On March 20, 2020, the IRS, DOL, and Department of Treasury issued a joint press release on the operation of these tax credits. On March 31, 2020, the IRS issued guidance on tax credits for leave taken under the FFCRA. For additional information, Locke Lord has issued a QuickStudy explaining the IRS's guidance.

The joint press release indicates that under the anticipated guidance, employers who pay qualifying ?sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of ?qualifying leave that they paid, rather than deposit those amounts with the U.S. Internal Revenue ?Services (IRS) under the traditional scheme. The payroll taxes that are available for retention include ?withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the ?employer share of Social Security and Medicare taxes with respect to all employees. Notably, if there ?are not sufficient payroll taxes to cover the cost of qualified sick and child-care leave paid, employers ?will be able to file a request for an accelerated payment from the IRS. The IRS expects to process ?those requests in two weeks or less.?

FFCRA ENACTS "EMERGENCY PAID SICK LEAVE ACT"

The amended FFCRA also enacts the Emergency Paid Sick Leave Act ("Sick Leave Act"). The Sick Leave Act requires all employers to provide immediately-available, paid sick leave time to all employees, regardless of how long they have been employed by the employer.

Coverage of Sick Leave Act

Like the amended FMLA, the Sick Leave Act only applies to private employers with fewer than 500 employees. This count includes employees on leave, temporary employees jointly employed by one or more companies (regardless of where the jointly-employed employees are maintained for payroll purposes), and day laborers supplied by a temporary agency.

The Secretary of Labor is authorized to issue good cause regulations that allow employers of certain health care providers and emergency responders to "opt out" of the paid leave requirements in the Sick Leave Act.

The Act also authorizes the Secretary of Labor to issue good cause regulations that exempt small businesses (under 50 employees) from providing paid sick leave to employees who seek leave to care for their child when the child's school or place of care has been closed, or the child's care provider is unavailable, due to COVID-19 precautions. DOL guidance provides that an employer, including a religious or nonprofit organization, with fewer than 50 employees is exempt from providing paid sick leave (or Public Health Emergency Leave, discussed above) due to school or place of care closures or child care provider unavailability for COVID-19 related reasons if an authorized officer of the business has determined that:

1. The provision of paid sick leave or Public Health Emergency Leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

2. The absence of the employee or employees requesting paid sick leave or Public Health Emergency Leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or Public Health Emergency Leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Finally, the Secretary of Labor is authorized to issue good cause regulations as necessary to carry out the purposes of the Sick Leave Act, including to ensure consistency with the amended FMLA and the tax credit provisions of the FFCRA

A corporation, including its separate establishments or divisions, is considered to be a single employer and its employees should be each counted toward the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are deemed joint employers, all of their common employees must be counted in determining whether the Sick Leave Act applies.

Relatedly, employers should also be cognizant of State and local ordinances that expand on the requirements of the FFCRA and Sick Leave Act. For example, on March 27, 2020, the Los Angeles City Council passed a paid sick leave ordinance applicable to large employers (more than 500 employees nationally) with terms that deviate from the Paid Sick Leave Act.

Eligibility for Sick Leave

The Paid Sick Leave Act provides that an employee is entitled to paid sick leave if he or she is unable to work (or telework) for one 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 (i.e., a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA) to self-quarantine because of concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual who is subject to an order as described in subparagraph or has been advised as described in paragraph (2).
- The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, because of COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The DOL's recently-updated guidance also clarifies that employees taking leave under the Sick Leave Act are also afforded the same job-protection rights as if taking Public Health Emergency Leave, i.e., employers are generally required to provide the same (or nearly equivalent) job to an employee who returns to work following leave.

The DOL guidance further provides that even where telework is offered ??by an employer, employees may nonetheless become unable to ??telework for qualifying reasons. Thus, employers should communicate openly with their ??employees to determine leave eligibility.? This guidance suggests that an employee is not eligible for paid sick leave under the Sick Leave Act simply because of a shelter in place or similar order a State or local authority.

According to the DOL, Employers are authorized to obtain (and should retain) documentation from employees sufficient to support requests for leave as specified in applicable IRS forms, instructions, and information for tax credits under the FFCRA. To date, however, the IRS has not released any such forms to guide employers on the types of documentation to be collected. The DOL has stated that, where materials sufficient to support the applicable tax credit have not been provided by an employee, the DOL's recently-updated guidance indicates employers are not required to provide leave.

In response to this guidance, Congress has stated that the FFCRA does not allow employers to require documentation of the need for leave beyond that already permitted by the FMLA, and that employers may not condition employee leave on what the IRS decides to require in terms of employer documentation for the refundable tax credit. Congress urges that the DOL guidance (and, presumably, regulations) thwart the law's purpose, which is to ensure employees are able to use their emergency paid sick and family leave during the COVID-19 pandemic in order to slow the spread of the disease while also avoiding further burdening the already taxed healthcare system with requests for doctor certifications.

Due to the disagreement between Congress and the DOL, it is currently unclear what, if any, documentation may be requested or required by an employer in support of paid sick leave.

Like with Public Health Emergency Leave it is still unclear whether two parents are able to take simultaneous leave for certain situations covered by the Sick Leave Act, e.g., caring for a child due to school/child care closures. Similarly, the DOL had made clear that employees who are teleworking for any qualifying reason may take intermittent leave in any increment agreed to between the employer and the employee. Employees may also take intermittent leave while working at their usual work site, so long as the employee's paid sick leave is taken to care for a child whose school is closed or childcare has become unavailable. For employees who are on leave for any other qualifying reason (e.g., to quarantine, seek treatment, or care for another who has been ordered to quarantine or is seeking treatment), employees may not take intermittent leave from their usual worksite.

The DOL's guidance has also clarified that paid sick leave benefits under the Sick Leave Act are limited when an employer is forced to shut down or when it furloughs employees. For example, an employer does not need to provide these benefits to its employees if it closes before April 1, 2020 (the effective date of the FFCRA) due to lack of business or pursuant to a Federal, State, or local directive. Similarly, an employer who closes after April 1, 2020, does not need to provide these paid benefits to employees who have not already gone out on leave. Where an employee is already on paid sick leave, an employer must pay for any paid sick leave used by the employee up to the time of the closure.

The DOL guidance also provides that employees are not entitled to take paid sick leave benefits during a furlough

caused by lack of work or business, even if the employer plans to reopen in the future. Similarly, if an employer has reduced (not eliminated) an employee's hours due to lack of work or business, the employee may not use these paid leave programs for the hours he or she is no longer scheduled to work.

As with the amended FMLA, Congress has taken issue with the DOL's guidance, noting that nothing in the FFCRA permits employers to cut off employees' rights to paid sick or family leave by reducing hours, furloughing employees, or closing a worksite. Given the context in which the FFCRA was passed—a nationwide social distancing directive with several statewide orders to shelter in place— Congress urges that its intent was to allow such workers to qualify for paid leave in those circumstances. Consistent with this broader construction, Congress has stated that the paid leave requirements attach to any employee "unable to work" due to a qualifying reason under the FFCRA, and does not hinge on an employer's ability to provide work to the employee. Notably, Congress acknowledges that employers may shut down entirely and permanently lay off employees, suggesting this is the only way to avoid the FFCRA paid leave requirements.

In an apparent effort to resolve existing confusion regarding the application of the FFCRA to workers impacted by shelter in place and safer at home orders, Congress has stated that the only reasonable conclusion of both the FFCRA's text and congressional intent is for the FFCRA to encompass such orders. Congress has expressed disapproval of the DOL's suggestion that an employer's closing of its worksite due to such a directive relieves it of providing paid sick or family leave under the FFCRA. Ultimately, however, disagreement between the DOL and Congress leaves unanswered the question of whether shelter in place or safer at home orders entitle affected employees to sick or family leave under the FFCRA.

Number of Sick Leave Hours Provided

Full-time employees are entitled to 80 hours of paid sick leave, and part-time employees are entitled to sick leave equivalent to those hours the employee works, on average, over a 2-week period.

Where the employee takes leave for his or her own self-isolation, medical diagnosis, or treatment, the employee is entitled to paid leave at 100% of his or her regular rate of pay. However, where leave is taken to care for a family member or child, employers only are required to provide leave at two- thirds the employee's regular rate of pay. The law imposes a cap on daily and aggregate sick leave pay, dictating that paid sick leave benefits are capped at $511 per day and $5,110 in the aggregate for an employee's self-isolation, medical diagnosis, or treatment. Additionally, a cap of $200 per day and $2,000 in the aggregate applies to any sick leave taken by an employee to care for a family member or child.

Pursuant to the CARES Act, an employer's requirement to provide paid leave under the Sick Leave act expires once an employee has been paid for the equivalent of 80 hours of work or upon the employee's return to work after taking paid sick leave under the Act. Guidance from the DOL issued just prior to the passage of the CARES Act, however, indicates that an employee may return to work before the exhaustion of these 80 hours and, prior to December 31, 2020, may use the remainder of any paid leave for another qualifying reason. [It is anticipated that this guidance will be amended to reflect the new March 31, 2021, cutoff reflected in the Consolidated Appropriations Act, 2021]

Guidance from the DOL and the CARES Act indicate that employers may choose to pay employees more than the

mandated cap. Employers may even allow employees to use employer-provided leave to supplement their paid FMLA leave and get the additional 1/3 of their normal earnings. Unlike the amended FMLA, however, employers may not require employees to use their employer-provided leave instead of or concurrently with their paid sick leave under the FFCRA, unless the employee agrees. Employers may not, however, receive tax credits for any leave payments exceeding the statutory cap.

For those employees paid under atypical or unusual arrangements, employers are instructed to calculate average daily hours worked in the same manner as the amended FMLA. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, employers may use a six- month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that. If this calculation cannot be made because the employee has not been employed for at least six months, employers are instructed to use the number of hours that the employer and employee agreed that the employee would work upon hiring. And if there is no such agreement, employers may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Notably, these new paid sick leave allotments are in addition to any rights or benefits to which an employee is already entitled under any other federal, state, or local law, collective bargaining agreement, or existing employer policy. Additionally, employers are prohibited from requiring that employees use employer-provided vacation time, sick time, or other paid time off before using paid sick leave under the Sick Leave Act. Thus, in some states or localities that require paid sick leave, such as California or the City of Los Angeles, the paid sick leave benefits under the Sick Leave Act must be provided in addition to those already-existing benefits.

Penalties for Noncompliance

The Sick Leave Act prohibits any employer from discharging, disciplining, or in any other manner discriminating against any employee who takes leave in accordance with the Act or who has filed a complaint or who has caused a proceeding to be instituted under the act or who provides testimony in any such proceeding. Any employer who willfully violates this prohibition is deemed in violation of the FLSA and is subject to penalties.

Employers that violate the terms of the Sick Leave Act by not paying employees for the leave shall be considered to have failed to pay minimum wage in violation of the FLSA, and be subject to penalties under the FLSA.

The March 20, 2020, joint press release from the IRS, DOL, and Department of Treasury states that the DOL will not bring an enforcement action against any employer for violations of the FFCRA during the first 30 days the law is in effect, so long as the employer has acted reasonably and in good faith to comply with the act. In its most recent guidance, the DOL made clear the 30-day moratorium shall run from March 18 through April 17, 2020. After April 17, 2020, this limited stay of enforcement will be lifted, and the DOL will fully enforce violations of the FCCRA. At that point, the DOL will retroactively enforce violations back until the effective date of April 1 if employers have not since remedied any violations.

Tax Credit

Similar to the tax credit afforded to employers for Public Health Emergency Leave, the FFCRA also ?provides a payroll tax credit for the Sick Leave Act.?

The March 20, 2020, joint press release from the IRS, DOL, and Department of Treasury indicates that under the anticipated guidance, employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying leave that they paid, rather than deposit those amounts with the IRS under the traditional scheme. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. Notably, if there are not sufficient payroll taxes to cover the cost of qualified sick and child-care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process those requests in two weeks or less.

Notably, certain “self-employed individuals” may also obtain benefits and tax credits under the Sick Leave Act, as more thoroughly discussed here. These benefits also have been extended with the Consolidated Appropriation Act, 2021, as detailed here.

NOTE: Because of the ever-changing COVID-19 legal environment, employers should consult with counsel for the latest ?developments and updated guidance on these topics.?

Visit our **COVID-19 Resource Center** often for up-to-date information to help you stay informed of the legal issues related to COVID-19.

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