3/17/20

Senate Majority Leader, Mitch McConnell announced that the Senate will pass the House’s Families First Coronavirus Response Act bill (H.R. 6201) with technical corrections. The House is still working on finalizing H.R. 6201, but it appears the final bill will be completed and sent to the Senate soon. Assuming the Senate passes the bill as-is, and President Trump signs it, here are the major employment-related highlights:

**Temporary Expansion of FMLA to Include Public Health Emergency Leave**

This portion of the bill applies to employers with fewer than 500 employees. It allows those employees who have worked for at least 30 calendar days to take protected FMLA leave if they are “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” Unlike the current 1,250 hours requirement for standard FMLA, there is no minimum hours requirement to take this type of Public Health Emergency leave. However, a public health emergency is limited to “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

The first 10 days of Public Health Emergency leave will be unpaid, but employees may choose to use any accrued sick time, vacation, PTO, or other paid leave. Employers are not allowed to require employees to use their accrued paid leave during the initial 10-day period. After the first 10 days, employers must provide paid leave for each additional day off at a rate of at least 2/3 of the employee’s regular rate of pay for the number of hours the employee would otherwise be scheduled to work. This is subject to a cap of $200.00 per day and $10,000.00 in the aggregate.

Employers with fewer than 25 employees are not required to reinstate employees after the end of their leaves if “the position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer – (i) that affect employment; and (ii) are caused by a public health emergency during the period of leave.” However, these small employers must make reasonable efforts to reinstate the employee and if those efforts fail, the employer must contact the affected employee(s) if an equivalent position becomes available within a year.

The Secretary of Labor will be given authority to exclude certain health care providers and emergency responders from this requirement. The Secretary will also be given authority to exempt small businesses with fewer than 50 employees “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

This portion of the law will take effect within 15 days after the bill is passed and signed by the President. It will end on December 31, 2020.

**Temporary Emergency Paid Sick Time**

This portion of the bill applies to public employers with 1 or more employees and private employers with fewer than 500 employees. It allows full-time employees to take 80 hours of employer-paid sick time if the employee is unable to work (or telework) for any of the following reasons:
1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. 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, due to COVID-19 precautions.
6. 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.

Part-time employees may take “a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.” Employees may take paid sick time “regardless of how long the employee has been employed by an employer.”

An employer must pay sick time at the employee’s regular rate of pay, up to $511.00 per day and $5,110.00 in the aggregate for time off taken for reasons (1)-(3) above. If the employee is absent for reasons (4)-(6), the employer must pay at least 2/3 of the employee’s regular rate of pay, up to $200.00 per day and $2,000.00 in the aggregate.

Paid sick time ends beginning with the employee’s next scheduled shift immediately following the end of his or her need for time off due to one of the reasons listed above. Unused paid sick time does not carry over from one year to the next.

Employers who already offer paid sick time cannot substitute their existing sick time policies for the 80 hours required by this law. Instead, they must provide the 80 hours in addition to their existing paid sick time or PTO policies. Additionally, employers may not:

- Change their existing paid sick time or PTO policies after this bill passes to avoid being subject to the additional 80 hours requirement;
- Require employees to use other accrued, unused sick time or PTO before using this additional 80 hours; or
- Require employees to search for or find a replacement employee to cover the hours as a condition of using paid sick time.

The U.S. Department of Labor will publish a model notice for employers to post within 7 days after the law is enacted.

This portion of the law will take effect within 15 days after the bill is passed and signed by the President. It will end on December 31, 2020.

The COVID-19 situation is ever-evolving and we anticipate further regulatory actions in response to this pandemic. As those actions occur, we will send new updates as soon as possible. If you have questions about how to implement the new FMLA and federal sick leave requirements, or about COVID-19 response generally, please don’t hesitate to contact us.
Stay safe and be well,