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Coronavirus Remedial Legislative Acts and the Connecticut Workplace

On March 18th Congress enacted and the President signed legislation to assist the nation in dealing with the economic impacts that are now here and which will become more acute over the weeks to come as the coronavirus penetrates throughout. The statutory reference is House Resolution (H.R.) 6201 which bears the title “Families First Coronavirus Response Act”. Encompassed within that Act are two provisions that may impact Connecticut employers and employees. Division E of H.R. 6201 is titled “Emergency Paid Sick Leave Act” and Division C is the “Emergency Family And Medical Leave Expansion Act”.

COVERED EMPLOYERS: These Acts are applicable to all employers with fewer than 500 employees. Sec. 5111 of the legislation (Emergency Paid Sick Leave Act) and Sec. 3110 (Emergency Family And Medical Leave Expansion Act) both provide that the Department of Labor may promulgate regulations to allow for small businesses with less than 50 employees to gain an exemption if the imposition of the requirements would jeopardize the viability of the business as a going concern. (No regulations have yet been promulgated with respect to the definition of “jeopardize the viability of the business as a going concern” or what the exemption application process will entail. However, on March 24, 2020, the US Department of Labor issued preliminary guidance on the application of the Acts. In the preliminary guidance DOL warns that a small employer (less than 50 employees) who intends to claim exemption from the Acts must be prepared to document why that small employer’s continued viability as a business would be jeopardized if it had to grant the newly created paid leave time. The documentation will have to be consistent with the proof requirements that are to be published in the future DOL regulations. It is quite possible that the exemption application process and proof of “jeopardy” are going to be so onerous that few will -- or may want to -- seek the exemption.)

Municipal employers with fewer than 500 employees are covered.

TAX CREDITS FOR COVERED EMPLOYERS: Employers who pay benefits required by the Act will be eligible to receive a tax credit for 100% of the qualified sick leave wages paid and/or the

qualified family leave wages paid during a quarter against payroll taxes due for that quarter under Sections 3111(a) and 3221(a) of the Internal Revenue Code.) See, H.R. 6201, Sections 7001 and 7003. (Note: IRC Section 3111(a) has an applicable tax rate of 6.2%. Section 3221 (a) is not relevant to this discussion as it applies to railroads.) The tax credit will also include the amount that the employer pays to continue the employee health insurance that the employer has subsidized during the term of the qualifying leave. If the amount of the qualified leave payments made to employees exceeds the payroll tax due for the quarter under IRC Section 3221(a) resulting in an excess credit, H.R. 6201, Section 7001 provides that the excess credit shall be treated as a tax overpayment that shall be refunded to the employer.

COVERED EMPLOYEES: The simple answer here is that if you are a covered employer, your employees are covered (must be employed for 30 days). The technical answer is that all employees, as that term is defined in Section 3(e) of the Fair Labor Standards Act, are covered employees. (There are certain other inclusions to “covered employees” not likely to be relevant to any readers of this advisory.)

The Department of Labor is authorized to adopt regulations to allow certain health care providers and emergency responders to opt out from the governing provisions.

EFFECTIVE DATE AND TERM --- The Emergency Paid Sick Leave Act and the Emergency Family And Medical Leave Expansion Act become applicable to all qualifying employees who seek benefits under the enactments on **April 1, 2020** or thereafter. These enactments sunset on December 31, 2020 and no benefits need be paid after that date.

COVERAGE -- EMERGENCY PAID SICK LEAVE ACT

Employers **shall** provide each employee, who is unable to work or telework, paid sick leave when the need for leave is caused by the following:

- (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 is seeking a medical diagnosis.
- (4) The employee is caring for a person who is subject to an order as described in subparagraph (1) or has been advised as in subparagraph (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 childcare provider of such son or daughter is unavailable due to COVID - 19.

- (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.

Full time employees, qualifying under subparagraphs (1) through (6) shall receive up to 80 hours of paid sick leave. Part time employees shall receive sick pay for the number of hours worked on average in a two-week period.

For leave taken under subparagraphs (1) through (3), the sick leave pay is to be equal to the employee's regular rate of pay except that it may be capped at \$511 per day (\$5110 in the aggregate.) If the employee takes leave under subparagraphs (4) through (6) to care for a son or daughter, the sick leave pay may be at two-thirds of the regular rate of pay (but no less than the applicable minimum wage) and may be capped at \$200 per day. The regular rate of pay is established by

Employers cannot discipline, discharge or in any manner discriminate against an employee who uses this leave. Employers cannot require the employee to use other available leave prior to accessing this leave.

This leave does not in any way alter or diminish the rights or benefits to sick leave that the employee may have under State or local law, any collective bargaining agreement or any company policy. (This leave is in addition to whatever is already in place.) This leave cannot be carried over to another year.

CONNECTICUT PAID SICK LEAVE Connecticut General Statutes Section 31 – 57r et seq.

Certain Connecticut employers with 50 or more employees (service industry employers, but not manufacturers or non-profits) are already required by state law to provide 40 hours of paid sick leave to covered employees. The new federal mandate is in addition to Connecticut's requirement. (Note: This is not intended to present a review of the Connecticut statutory scheme.

COVERAGE -- EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

This FMLA enhancement applies to the same employers previously identified in this memo. **(It includes municipal employers with fewer than 500 employees.)**

It creates a new category of FMLA leave known as **Public Health Emergency Leave**. The first trigger must be the declaration of a public health emergency by Federal, State or local authorities with respect to COVID – 19. (That trigger has taken place in Connecticut.) This leave is only available to employees who are unable to work or telework because they must care for a son or daughter, under the age of 18, if the child's school or day care provider or child care provider has been closed or is unavailable due to the public health emergency. A child care provider is a provider that receives compensation for providing that service on a regular basis.

Public Health Emergency Leave is available for up to 12 weeks. (but not beyond December 31, 2020 as the Act expires on that date.) The first two weeks of this leave is unpaid. (Remember, if the employee qualifies for this narrow category of FMLA leave, the employee will also qualify

for up to 80 hours of paid sick leave under the Emergency Paid Sick Leave Act.) The employee may continue to receive pay during the first two weeks of the leave by utilizing any other type of leave that may be available (sick, vacation, personal...). After the initial two week period, the Public Health Emergency Leave becomes paid leave. The employee must be paid at least two-thirds of that employee's regular rate of pay but the cap of \$200 per day may be applied. There is also an aggregate cap of \$10,000.

Interestingly, the Act requires any employee who may foresee the need to take such leave to notify the employer as soon as practical with respect to the potential need. (And if the employee doesn't provide such notice "as soon as practical" does the employer have a remedy? That answer appears to be, No!)

As with other FMLA leave, employers with more than 25 employees must make employment available to the leave taker at the end of the leave. If the employer has less than 25 employees there are certain exceptions to the rule mandating re-employment. The most likely exception to restoration arises when the small employer no longer has the job available due to economic conditions that arose as a result of the public health emergency and that employer has tried to restore the employee to an equivalent position.

The leave granted under this narrow Act, is the only paid FMLA required by Federal law. None of the other types of FMLA leave are "paid" leaves.

CONNECTICUT FAMILY AND MEDICAL LEAVE ACT CONNECTICUT GENERAL STATUTES SECTION 31 -51 KK et seq.

Given that Connecticut has its own FMLA, providing benefits that differ/exceed those available under the Federal FMLA, before its expansion, thought has to be given to how the new emergency legislation interacts with existing State law. Covered Connecticut employers (those having 75 or more employees, but not including municipalities) must provide 16 weeks of FMLA leave for reasons qualifying under the State FMLA. As of this writing, there is no State enactment adding a provision to the Connecticut FMLA to parallel the just created Public Health Emergency Leave under the Federal FMLA. Therefore, Connecticut employers subject to the Federal legislation need only provide Public Health Emergency Leave for 12 weeks and not for the 16-week period of FMLA leave that you may have become used to working with. (Note: No Public health Emergency Leave will extend beyond December 31st unless Congress extends the applicability of the legislation.)

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