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COVID-19 Prompts Federal & New York State Legislation Implementing Paid Sick Time & Emergency Family and Medical Leave

On March 18, 2020, the federal government and New York State both passed legislation responding to the outbreak and continuing spread of COVID-19.

Families First Coronavirus Response Act

President Donald Trump signed into law the Families First Coronavirus Response Act (“H.R. 6201”). This legislation has several consequences for employers as it amends the Family and Medical Leave Act (“FMLA”) to include a temporary provision called the Emergency Family and Medical Leave Expansion Act (“Emergency FMLA”). The federal legislation also creates a new, and also temporary, Emergency Paid Sick Leave Act.

Emergency Family and Medical Leave Act

Division C of H.R. 6201 describes the Emergency FMLA. The statute is both broader and narrower in scope than the FMLA which employers have long been familiar with. The statute is broader in that it applies to all employers with fewer than 500 employees (whereas FMLA traditionally applies only to employers with at least 50 employees in a 75-mile radius), and provides benefits to employees who have been with the company at least 30 days (whereas FMLA requires 1 year of employment and 1,250 hours of work in the prior calendar year). The Emergency FMLA is narrower in scope than the FMLA because it addresses only an employee’s need for leave when he or she is unable to work or telework because he or she needs to care for their child under 18 years of age if the school or place of care is closed, or the child care provider of such child is unavailable due to a public health emergency. The act defines a public health emergency as an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

The first ten days for which an employee takes leave under the amended Emergency FMLA may consist of unpaid leave. However, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for this

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unpaid leave, and this period may also be separately compensable under the Emergency Paid Sick Leave Act, discussed below. After the first ten days of this leave, the employer shall provide paid leave for each day of leave the employee takes after the initial ten days under this section. According to the Emergency FMLA, this paid leave shall be at least two-thirds of the employee's regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work, but is capped at \$200 per day or \$10,000 in the aggregate, over the remaining 10 weeks of Emergency FMLA. The statute does not specifically address circumstances where the schools remain closed longer than ten weeks, or circumstances where employees may have already used FMLA within the prior calendar year; such situations will have to be considered carefully.

The Secretary of Labor is authorized to exclude certain health care providers and emergency responders from coverage under the Emergency FMLA, and may also excuse from compliance with the Emergency FMLA small businesses with fewer than 50 employees where the requirements of this section would jeopardize the viability of the business; it remains to be seen what form such regulations may take. In addition, an employer of health care providers or emergency responders may elect to exclude such employees from the application of these provisions.

As in the FMLA, the Emergency FMLA requires reinstatement of the employee at the conclusion of leave, but contemplates an exception for employers with fewer than 25 employees where the employee's position was eliminated due to economic conditions or other changes in operating conditions due to the public health emergency during the period of leave, where the employer made reasonable efforts to restore the employee to an equivalent position, and where the employer makes reasonable efforts to contact the employee if an equivalent position becomes available.

The Emergency FMLA shall take effect no later than 15 days after the date of enactment of H.R. 6201.

Emergency Paid Sick Leave Act

Division E of H.R. 6201, called the Emergency Paid Sick Leave Act, requires employers with fewer than 500 employees to give their employees paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

- (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.

Employers of health care providers or emergency responders may elect to exclude such employees from the application of this section.

Under this section, full-time employees are entitled to 80 hours of paid sick time, and part-time employees are entitled to the same number of hours of paid sick time as they work, on average, over a 2-week period. This paid sick time shall be available for immediate use regardless of how long the employee has been employed, and the employer may not require an employee to use other paid leave before using the paid sick time provided by this section.

Paid sick leave under this statute is based on the employee's usual hours and rate of pay, but shall not exceed \$511 per day (\$5,110 in aggregate) when used for purposes of the employee's own COVID-19-related symptoms or isolation. However, when an employee acts as caregiver due to the current public health emergency, paid

sick time is calculated based on two-thirds of the employee's regular rate or applicable minimum wage, whichever is greater, and shall not exceed \$200 per day and \$2,000 in the aggregate.

Paid sick time under this section shall not carry over from one year to the next, and paid sick time provided to an employee under this section ceases beginning with the employee's next scheduled work shift immediately following the termination of the need for paid sick time under this section. The Emergency Paid Sick Leave Act shall take effect no later than 15 days after the date of enactment of H.R. 6201 and expires on December 31, 2020.

Tax Credits for Employers

Employers will have to pay the costs of benefits guaranteed to employees under the Emergency FMLA and Emergency Paid Sick Leave Act, but will be eligible for corresponding tax credits offsetting the employer's portion of Social Security taxes. In particular, employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act, and are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency FMLA. However, only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

New York Paid Leave Bill

New York State has enacted legislation providing sick leave benefits to those affected in various ways by COVID-19. Under the New York Paid Leave Bill, employees receive paid sick time if they are subject to a precautionary or mandatory order of quarantine or isolation issued by the State of New York, the Department of Health, Local Board of Health, or any governmental entity due to COVID-19. (Notably, and in contrast to the federal legislation, the statute does not mention private health care providers.) However, employers' responsibilities under this legislation vary based on their number of employees, their net income, and their industry.

Employers with ten or fewer employees and an annual net income less than \$1 million are required to provide unpaid leave and job protection for the duration of the

quarantine order; the statute designates this leave a covered form of Paid Family Leave for which employees will be eligible for partial income replacement. Employers with between 11 and 99 employees, and smaller employers with a net income exceeding \$1 million, are required to provide employees with at least 5 days of paid sick leave and job protection for the period of the quarantine order, with the unpaid portion again covered as Paid Family Leave. Employers with 100 or more employees are required to provide at least 14 days of paid sick leave and ensure job protection for the period of the quarantine order. These provisions are to take effect immediately upon passage.

Employees subject to a quarantine because they returned to the United States after personal, non-business travel to a country for which the Centers for Disease and Control Prevention has a level two or three travel health notice are not entitled to receive paid sick leave or other benefits provided by this statute. These provisions and benefits also do not apply to employees who are asymptomatic or not diagnosed with any medical condition and are physically able to work remotely or by other similar means while under quarantine.

Employers will be required to post a notice within 7 days after the date of enactment of this bill describing its requirements. The Secretary of Labor will make a model notice available to the public.

Changes to Paid Sick Time Under New York Paid Leave Bill Beyond COVID-19

This legislation also provides for three other provisions concerning paid sick leave unrelated to COVID-19, which will become effective 180 days after enactment. Employers with 4 or fewer employees and annual net income less than \$1 million will be required to provide at least 5 days of unpaid sick leave each year. Employers who employ between 5 and 99 employees, and smaller employers with an annual net income exceeding \$1 million will provide at least 5 days of paid sick leave each year. Employers with 100 or more employees will provide at least 7 days of paid sick leave each year.

New York Grant Retention Program

The New York Grant Retention Program enacted on March 8, 2020 provides some guidance on how employers will fund the benefits provided for due to COVID-19. This Program provides financial assistance for small businesses impacted by COVID-19. More specifically, employers with 5 or fewer employees can receive a grant to cover

40% of payroll costs for 2 months to help retain employees and business with fewer than 100 employees are eligible for 0% interest loans up to \$75,000. Additionally, the Federal Small Business Administration declared disasters in a number of states including New York, California, Washington, Connecticut, Massachusetts and others triggering the availability of small business loan assistance.

How these Federal and State Laws Interact

The provisions of the New York Paid Leave Bill concerning paid sick leave for individuals under orders for quarantine or isolation due to COVID-19 provide that, “if at any point while this section shall be in effect the federal government by law or regulation provides sick leave and/or employee benefits for employees related to COVID-19, then the provisions of this section, including, but not limited to, paid sick leave, paid family leave, and benefits due to disability, shall not be available to any employee otherwise subject to the provisions of this section.” In that case, however, New York employees remain eligible for benefits in excess of those guaranteed under federal law.

One immediate application of this provision is that employers with more than 500 employees, who are exempt from the Emergency Paid Sick Leave Act, may remain subject to New York State requirements.

New York State Executive Order 202.6

On March 19, 2020, Governor Cuomo issued Executive Order 202.6 in New York State. This order requires that all non-essential businesses and workplaces in New York State arrange for 75% of their employees work from home, effective Friday, March 20 at 8 pm. This order supersedes Governor Cuomo’s earlier direction that 50% of all non-essential business’ employees should work from home. The Executive Order appears intended to remain in effect for the duration of the State of Emergency that Governor Cuomo declared in response to the COVID-19 pandemic.

If you have any questions about these pieces of legislation or would like additional information, please contact John Keil at (212) 758-7862 or jkeil@collazokeil.com, or any other attorney at the firm.