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TO: Clients

RE: Families First Coronavirus Response Act Enacted Wednesday, March 18

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On Wednesday Congress passed, and President Trump signed, the Families First Coronavirus Response Act (“FFCRA”). It offers protections for workers impacted by the COVID-19 outbreak. Employers must provide two weeks of paid sick leave to employees who need it to care for their own health or to care for others as a result of Coronavirus. Employers must also provide 12 weeks of leave to employees whose children’s schools have been closed because of Coronavirus. **The federal government will fully reimburse employers for amounts they pay to employees who use these new leave options.** Each of these provisions takes effect by April 2, and expires on December 31, 2020. Here is additional detail:

**Emergency Paid Sick Leave**

Under the Emergency Paid Sick Leave division of the FFCRA, any **employer with fewer than 500 employees must provide up to two weeks of paid sick time** to any employee who 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 a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
- (5) The employee is caring for their child because the school or place of care of the child has been closed, or the child care provider 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.

A full-time employee is entitled to 80 hours of paid sick time and a part-time employee is entitled to a pay rate based on their average number of hours worked per two-week period.

The federal requirement and the federal reimbursement do not apply to an employee's entire salary. They only require employers to pay up to a cap set in the law.

An employee using paid sick time for reasons (1) through (3) above is entitled to their regular rate of pay – or the greater of the Federal or state/local minimum wage, if either is greater than the regular rate of pay – up to \$511 per day and \$5,110 total, a rate of \$132,860 per year. An employee using paid sick time for reasons (4) through (6) is entitled to two-thirds of their regular rate of pay, up to \$200 per day and \$2,000 total, a rate of \$52,000 per year.

This paid sick time must be made available to employees immediately, regardless of how long the employee has been employed by the employer. An employer may not require an employee to use other paid leave prior to using the paid sick time discussed above.

Employers must post a notice regarding the availability of this sick time with other required notices. The law requires the Department of Labor to provide a model notice within the next week. Given the circumstances, we recommend employers email this notice to all employees by April 2, and post it in offices when appropriate.

### **Emergency Family and Medical Leave Expansion**

Under the Family and Medical Leave Act (“FMLA”), employees are entitled to 12 weeks of unpaid leave to care for their own health or for a family member. As now amended, the FMLA entitles an eligible employee up to 12 weeks of a mix of unpaid and paid leave if they are unable to work (or telework) due to a need to care for their child (under 18 years of age) if the child's school or child care center has been closed, or the paid child care provider is unavailable, due to a COVID-19 public health emergency declared by a government authority.

There are two crucial distinctions between this COVID-19-related FMLA leave and FMLA leave taken for other reasons. First, any employee is eligible for the COVID-19-related leave if they have been employed for at least 30 calendar days, while only employees employed for 12 months and 1,250 hours are eligible for FMLA leave taken for other reasons. Second, with respect to COVID-19, the new law greatly expands the number of employers covered by the FMLA. Any employer of fewer than 500 employees must provide the COVID-19-related leave; FMLA leave for other reasons applies only to employers who employ 50 or more workers within a 75 mile radius.

The Secretary of Labor may exempt “small businesses” with fewer than 50 employees from the COVID-19-related leave requirement when it would “jeopardize the viability of the business as a going concern.” There is no word yet on how or whether this exemption would apply to a non-profit organization, or the process for getting an exemption.

The first 10 days of COVID-19-related leave may be unpaid, though an employee may elect to substitute emergency paid sick leave, any accrued vacation leave, personal leave, or medical or sick leave for this unpaid period (including the COVID-19 sick leave described above). After the initial 10 days, the employer must pay the employee not less than two-thirds of their regular rate of pay for the remainder of the leave, up to \$200 per day and \$10,000 total.

In general, an employer must restore an employee returning from FMLA leave to the same or an equivalent position. But, under the new law, employers of fewer than 25 employees (who previously had no FMLA obligations at all) are not required to restore an employee to the same or an equivalent position, if the position held by the employee prior to taking the COVID-19-related leave does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by the COVID-19 outbreak. The employer must make reasonable efforts to restore the employee to an equivalent position and, if the reasonable efforts fail, the employer must make reasonable efforts to contact the employee if an equivalent position becomes available for a period of one year beginning on the earlier of the date on which the public health emergency ends or the date that is 12 weeks after the employee's leave commences.

An employer of fewer than 50 employees that fails to comply with the FMLA provisions of the new law will *not* be subject to the FMLA's provision allowing employees to sue the employer for damages equal to unpaid amounts to which the employee is entitled.

### **Refundable Tax Credit for Wages Paid**

Employers with 500 or fewer employees will be allowed to take a tax credit equal to 100% of the COVID-19-related sick leave wages and FMLA leave wages and a proportionate share of qualified health plan expenses paid during the quarter. The credit is taken against quarterly payroll taxes. If an employer's tax credit exceeds the amount paid in payroll taxes, the employer will get a refund. So, the net effect is that the amount of **all wages and health plan benefits paid for COVID-19-related sick and FMLA leave come back to the employer**, first as a credit against payroll taxes owed, and then the remainder as a refund. The federal government will reimburse employers for health care expenses in proportion to the pay reimbursement levels in the FFCRA.