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WHAT EMPLOYERS SHOULD NOTE ABOUT THE CARES ACT STIMULUS LEGISLATION

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The CARES Act tweaks the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act and establishes Federal Pandemic Unemployment Compensation to supplement state unemployment. Employers should take note of these provisions.

President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) on March 27, 2020. This extensive 880-page stimulus legislation is packed full of a variety of incentives for employers and their workers, which employers will want to consider as they decide how to manage their workforce in the coming days, weeks and even months. One important piece of the legislation is the Paycheck Protection Program discussed here. In this blog, we tackle the portions of the CARES Act that amend the Emergency Paid Sick Leave Act (“EPSLA”) and Emergency Family and Medical Leave Expansion Act (“EFMLEA”), which take effect on April 1, 2020 and were previously covered here. We also discuss the enhanced unemployment benefits made available to workers by the CARES Act.

EPSLA and EFMLEA Cleanup

As noted above, the CARES Act includes a handful of clarifications related to the EPSLA and EFMLEA, which were passed last week. Those tweaks include:

- Clarifying that pay under the EFMLEA is capped at $200 per day per employee and $10,000 per employee.

- Clarifying that pay under the EPSLA is capped at $511 per day per employee and $5,110 per employee for EPSLA taken for those who are under quarantine (government or health care ordered) or are experiencing symptoms of COVID-19 and being tested.

- Clarifying that pay under the EPSLA is capped at $200 per day per employee and $2,000 per employee for EPSLA for employees who are caring for quarantined or sick individuals or a child whose school or child care is closed or unavailable.
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- Extending the definition of "eligible employee" under the EFMLEA to include an individual laid off March 1, 2020, or later, who was employed for 30 of the 60 days prior to the layoff and who is rehired by the employer. Employers who have done layoffs prior to the effective date of the Acts will need to be mindful of this provision if they subsequently rehired those workers.

- Providing for the creation of a process for employers to seek advances of the tax credits provided under the EPSLA and EFMLEA, with regulations to follow.

It is noteworthy that on March 26, the U.S. Department of Labor also issued new guidance clarifying that in circumstances when an employee is out of work due to lack of work, the employee’s recourse is to seek unemployment benefits and not to receive leave under the EPSLA or EFMLEA. Unlike the DOL’s initial Guidance, which did not shed much light on how to navigate the new laws, the DOL’s subsequent Guidance clarifies a number of grey areas that employers have been struggling with as they approach the April 1, 2020, effective date for the EPSLA and EFMLEA. The new Guidance is available here and begins at Question No. 15.

Federal Pandemic Unemployment Compensation

Given the DOL’s clarification that an employee who is out of work due to a lack of work is not eligible for leave under the EPSLA or EFMLEA and is instead eligible for unemployment benefits, the expansive unemployment program created by the CARES Act is all the more important. The unemployment program is to be administered by the states. Among the features of this program are:

- Coverage for individuals normally not covered by unemployment, such as those who are self-employed, independent contractors and gig workers.

- A $600 per week payment on top of the normal unemployment benefit to be paid by the state to individuals who would be eligible if the state law were applied. This benefit, referred to as “Federal Pandemic Unemployment Compensation,” is payable regardless of how much the individual earns. This is not charged against the employer’s experience rating. This benefit expires July 31, 2020.

- An extension of up to 13 weeks of additional unemployment benefits known as “Pandemic Emergency Unemployment Compensation” in addition to the standard 26 weeks that are normally available under state law. To obtain the additional 13 weeks, individuals must be able to work, available to work and actively seeking work.

- Coverage for the first week of unemployment benefits in states that provide benefits during a person’s first week of unemployment. This eliminates the typical waiting period, allowing faster access to the funding.

- The Act also makes up to 39 weeks of unemployment assistance available to individuals who are unavailable to work due to COVID-19. To be eligible for this benefit, an individual must certify that
he/she is unemployed, partially unemployed, or unable or unavailable to because —

1. the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

2. a member of the individual’s household has been diagnosed with COVID-19;

3. the individual is providing care for a family member or a member of the individual’s household who has been diagnosed with COVID-19;

4. a child or other person in the household for whom the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;

5. the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;

6. the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

7. the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;

8. the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;

9. the individual has to quit his or her job as a direct result of COVID-19;

10. the individual’s place of employment is closed as a direct result of the COVID-19 public health emergency; or

11. the individual meets any additional criteria established by the Secretary for unemployment assistance.

● Individuals are not eligible for the new unemployment benefit if:

1. They have the ability to telework with pay or

2. They are receiving sick leave or other paid leave benefits under the EPSLA or EFMLEA.

Union protection

Mid-sized employers, defined as those with between 500 and 10,000 employees, that receive stimulus funding will have to certify (among other things):
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- The employer will not terminate any collective bargaining agreement to which it is a party during the term of the loan or for two years after repayment.
- The employer will remain neutral to union organizing during the loan.

Small business loans

Again, a key piece of the CARES Act is expansion of the Small Business Administration’s (SBA) Section 7(a) Loan Program to get liquidity to qualifying businesses and to encourage such businesses to keep employees on their payroll.

Title I of the CARES Act creates a Paycheck Protection Program, which increases eligibility for Section 7(a) loans for certain small business and organizations and provides terms that allow portions of the loans to be forgiven based on the borrower’s retention of employees. Read more about the key elements businesses need to understand in this article by Greensfelder’s Business Services team.

Emergency funding for individuals

In the context of concern for employee well-being, employers should also be aware of the emergency funding for individuals provided in the CARES Act. The new stimulus bill includes direct funding of up to $1,200 per adult and $500 for each child. Individuals who reported $75,000 adjusted gross income or less and couples with an adjusted gross income of $150,000 or less will receive the full amount, with the amount decreasing for each additional $1,000 earned. Individuals with an AGI of $99,000 or over ($198,000 for a couple) will not receive this funding.

Finally, the new legislation also allows employees to withdraw up to $100,000 from qualified retirement plans without penalty for COVID-19-related reasons.

Our Employment & Labor Practice Group is continuing to monitor these developments and is available to answer your questions.

Link to COVID-19 Resources page