UTAH BANKERS ASSOCIATION

Paid Leave Provisions – Families First Coronavirus Response Act

On March 18, 2020, Congress passed, and the President signed into law Families First Coronavirus Response Act (HR 6201), a broad-ranging response to the COVID-19 outbreak. Two principal provisions of HR 6201 will impact employers—a temporary expansion of the Family and Medical Leave Act (FMLA) to provide paid leave for employees unable to work due to closure of schools and child-care facilities and temporary paid sick leave for COVID-19-related absences. FFCRA will become effective April 1, 2020 through December 31, 2020.

Emergency FMLA (EFMLA) Leave

- Applies to employers with fewer than 500 employees
- Only covers absences due to COVID-19 school and child-care closures
- First 10 days of leave are unpaid (but employees can use other paid leave)
- Remainder of 12-week leave period is paid at two-thirds of employee's normal rate times employee's normal work week
- Cap limits required EFMLA pay to $200 per day and $10,000 total
- Limited carve-outs for health-care providers, emergency responders, and employers with fewer than 25 employees, to be clarified by regulations

Which Employers Are Covered?

HR 6201's EFMLA provisions apply to all employers with fewer than 500 employees, as do the emergency sick-leave requirements discussed in the next section. The Department of Labor has authority to issue regulations exempting businesses with fewer than 50 employees when requiring EFMLA and/or emergency sick leave "would jeopardize the viability of the business as a going concern."

Which Employees Are Covered?

Employees are eligible to take EFMLA leave once the employee has been employed for at least 30 calendar days. Employers may exempt health-care providers and emergency responders from eligibility for EFMLA leave. The scope of this exemption is unclear but will be clarified by regulations from the Department of Labor.

What Purposes Allow Taking EFMLA Leave?

EFMLA leave under HR 6201 is for a single purpose—inability to work (in person or remotely) because of the need to care for a child under the age of 18 due to a school or child-care facility closure caused by an emergency declared by federal, state, or local authorities related to COVID-19. It does not cover other COVID-19 related absences—although ordinary FMLA and the paid sick-leave provisions of HR 6201 may cover such absences.

What Does EFMLA Leave Require?

EFMLA leave under HR 6201 is a 12-week period of job-protected leave. The first 10 days of leave are unpaid, although an employee may choose to use any available paid leave (vacation, PTO, sick leave, emergency paid sick leave, or personal leave) during the first 10 days. Employers may not require employees to take paid leave to cover the first 10 days of EFMLA. After the 10-day period of unpaid leave, the EFMLA leave must be paid. At minimum, the paid leave must be at two-thirds of the employee's regular rate of pay (as determined under the Fair Labor Standards Act (FLSA) for overtime purposes) for the employee's normally scheduled hours. However, the paid leave requirement need not exceed $200 per day and $10,000 in total.

If an employee's regularly scheduled hours are variable, HR 6201 requires use of the average hours worked—including hours where the employee took any kind of leave—over a six-month lookback period. If an employee with variable hours did not work during the six-month lookback period, HR 6201 requires payment of EFMLA based on "the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work."

What Happens When EFMLA Leave Ends?

EFMLA leave is job-protected to the same extent as ordinary FMLA leave—the employer generally has an obligation to reinstate the employee to their prior position, or an equivalent position with equivalent pay and benefits. HR 6201 makes a limited exception for employers with fewer than 25 employees when such employers experience COVID-19-related economic adversity causing the loss of the employee's prior position. Under these circumstances, the employer's obligation is to (1) make reasonable efforts to restore the employee to an equivalent position, and (2) if these "reasonable efforts" fail, to make reasonable efforts to contact the employee about any equivalent positions that become available in the 12-month period following the earlier of the end of the need for EFMLA leave or the end of the 12-week EFMLA leave period.