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MEMORANDUM

TO: United Way of New York State

FROM: Hinman Straub P.C.

Re: The Federal Emergency Family and Medical Leave Expansion Act and
Emergency Paid Sick Leave Act: *The Impact on New York Businesses*

Date: March 22, 2020

On March 18, 2020, President Donald Trump signed into law the Families First Coronavirus Response Act, (Families First Coronavirus Response Act, H.R. 6201, 116th Cong. (2020)), the second of a three-part federal response effort to the COVID-19 pandemic. This memorandum will address two significant provisions of this Act that will impact employers, both public and private, beginning April 2, 2020.

The first provision is an expansion of the Family and Medical Leave Act (“FMLA”), that permits eligible employees to take job-protected leave to serve as a caregiver for their child due to a school or childcare closure or unavailability of a child care provider as a result of a public health emergency related to COVID-19 (hereinafter “Emergency Family and Medical Leave Expansion Act”).

The second provision is a new emergency federal paid sick leave law, (hereinafter “Emergency Paid Sick Leave Act”), that requires employers, both public and private, to provide paid sick leave to eligible employees who are subject to a quarantine or isolation order related to COVID–19, experiencing symptoms related to COVID-19, caring for an individual subject to a quarantine or isolation order related to COVID–19, caring for a son or daughter due to school and place of care closures or unavailability of child care provider due to COVID–19, or who is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

This memorandum will also discuss the tax credits available to employers to offset the costs associated with providing paid leave pursuant to the new federal laws. Finally, this memorandum will address the interplay between these new federal provisions and the recently enacted New York COVID-19 Paid Sick Leave Law (“NY COVID-19 Paid Sick Leave Law”). Please note that New York is likely to shortly enact other legislation as part of the State Budget providing additional paid sick leave time.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Effective April 2, 2020 through December 31, 2020, the Emergency Family and Medical Leave Expansion Act permits eligible employees to take job-protected leave due to a qualifying need related to a public health emergency. A qualifying need related to a public health emergency is specifically limited to caring for a son or daughter under 18 years of age where the employee is unable to work (or telework) as a result of a school or place of care closure or because the child care provider is unavailable due to a public health emergency. (*Id.* §110(a)(2)(A)). A “public health emergency” is also specifically limited to an emergency with respect to COVID–19 declared by a Federal, State, or local authority. (*Id.* at §110(a)(2)(B)). A “child care provider” means a provider who receives compensation for providing child care services on a regular basis. (*Id.* §110(a)(2)(C)). The term “school” means an elementary or secondary school. (*Id.* § 110(a)(2)(D)). Other than the above definitions added by the Emergency Family and Medical Leave Expansion Act, the remaining definitions and provisions of the FMLA still apply. (*Id.* § 110(a)(1)).

Thus, an employee will be permitted under the Emergency Family and Medical Leave Expansion Act to take twelve (12) weeks of job-protected leave for the above stated qualifying reason. However, and as discussed in further detailed below, a portion of the leave taken for this qualifying reason must now be paid. This is a significant change from the preexisting requirements of the FMLA that permit twelve (12) weeks of unpaid job-protected leave. It is important to note that the provisions of this paid job-protected leave apply only to leave taken for a qualifying need related to a public health emergency and for no other qualifying reasons under the FMLA.

Covered Employers and Eligible Employees

The Emergency Family and Medical Leave Expansion Act applies to employers with fewer than five hundred (500) employees. (*Id.* §110(a)(1)(a)(B)). This is a change from the regular provisions of the FMLA that apply to employers with fifty (50) or more employees.

Additionally, an employee is eligible to take leave pursuant to the Emergency Family and Medical Leave Expansion Act if the employee has worked for the employer for thirty (30) calendar days. (*Id.* § 110(a)(1)(A)). This time period is significantly less than the regular provisions of the FMLA that require an employee to have worked for an employer for twelve (12) months and for 1,250 hours before becoming eligible for FMLA leave.

Paid Leave

Different from the regular provisions of the FMLA that permit unpaid job-protected leave, the Emergency Family and Medical Leave Expansion Act mandates that part of the employee’s leave taken for a qualifying need related to a public health emergency as defined above must be paid. The first ten (10) days of leave taken for this qualifying reason shall be unpaid. (*Id.* at §110(b)(1)(A)). During this time of unpaid status, the employee may elect to use their accruals (i.e. vacation, sick, personal time). (*Id.* at § 110(b)(1)(B)). After the first ten (10)

days of unpaid leave, an employer shall pay the employee for each remaining day of the twelve-week leave. (Id. §110(b)(2)(A)).

To the extent the leave is foreseeable, the employee must provide notice of leave to their employer as practicable. (Id. §110(c)).

Calculation of Paid Leave

Leave taken pursuant to the Emergency Family and Medical Leave Expansion Act is calculated based on: (1) “an amount that is not less than two-thirds of an employee’s regular rate of pay; and (2) the number of hours the employee would otherwise be normally scheduled to work.” (Id. §§110 (b)(2)(B)(i)(I)-(II)). However, “in no event shall paid leave exceed \$200 per day and \$10,000 in the aggregate.” (Id. §110 (b)(2)(B)(ii)).

For part-time employees or employees with varying schedules week to week, the employer must calculate the hours worked by using “a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.” (Id. §110(b)(2)(C)(i)). However, if the employee did not work the previous 6-months, the employer must use “the reasonable expectation . . . at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.” (Id. at § 110(b)(2)(C)(ii)).

Special Rules and Exemptions

The Secretary of Labor is empowered to issue regulations pursuant to the Emergency Family and Medical Leave Expansion Act. (Id. at § 110(a)(3)). The Secretary of Labor may exclude “certain health care providers and emergency responders from the definition of eligible employee” and exempt “small businesses with fewer than 50 employees from the requirements of [the Emergency Family and Medical Leave Expansion Act] when the imposition of such requirements would jeopardize the viability of the business as a going concern.” (Id. at § 110(a)(3)(A)-(B)).

Additionally, the Emergency Family and Medical Leave Expansion Act contains a special rule or opt-out provision for employers of health care providers and emergency responders to elect to exclude employees from the application of the amendments under the Emergency Family and Medical Leave Expansion Act. (Id. at § 3105).

Job-Protected Leave

Similar to the regular provisions of the FMLA, employers with twenty-five (25) or more employees are obligated to return employees taking leave pursuant to the Emergency Family and Medical Leave Expansion Act to the same or equivalent position upon the employees’ return to work after leave. (Id. at § 110 (d)). However, the Emergency Family and Medical Leave Expansion Act exempts employers with fewer than twenty-five (25) employees from the

requirement to restore employees to a same or similar position so long as the following conditions are satisfied:

- (1) The employee takes leave under [the Emergency Family and Medical Leave Expansion Act].
- (2) The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer: (i) that affect employment; and (ii) are caused by a public health emergency during the period of leave.
- (3) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.
- (4) If the reasonable efforts of the employer . . . fail, the employer makes reasonable efforts . . . to contact the employee if an equivalent position . . . becomes available [for a] 1-year period beginning on the earlier of the date on which the qualifying need related to a public health emergency concludes; or the date that is 12 weeks after the date on which the employee’s leave commences.

(Id. at §§ 110(d)(1)-(3)).

Collective Bargaining Agreements

An employer who has a multiemployer collective bargaining agreement may, “consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations . . . by making contributions to a multiemployer fund, plan, or program based on the paid leave each of its employees is entitled to under such section while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under [the Emergency Family and Medical Leave Expansion Act].” (Id. at § 3103(a)).

Additionally, “employees who work under a multiemployer collective bargaining agreement into which their employers make contributions as provided in subsection (a) may secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under [the Emergency Family and Medical Leave Expansion Act].” (Id. at § 3103(b)).

EMERGENCY PAID SICK LEAVE ACT

Effective April 2, 2020 through December 31, 2020, the Emergency Paid Sick Leave Act requires covered employers, private employers with five hundred (500) or fewer employees and public employers, to provide employees with paid sick time to the extent that an 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 individual¹ 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 condition² specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Id. at §§ 5102(a)(1)-(6)).

Under the Emergency Paid Sick Leave Act, full-time employees are entitled to eighty (80) hours of paid sick time. Id. at § 5102(d)(1)(2)(A)). Part-time employees are entitled to the number of hours of paid sick time equal to the number of hours that the part-time employee works on average over a two (2) week period. Id. at § 5102(d)(2)(B)).

An employee may use qualifying sick time under the Emergency Paid Sick Leave Act immediately, regardless of how long the employee has been employed. Id. at § 5102(e)(1)). Paid sick time cannot be carried over to the following year. Id. at § 5102(d)(1)(3)).

¹ The term “individual” is not defined in the Emergency Paid Sick Leave Act. At this time, it is unclear how this term will be interpreted and applied when an employee is seeking to utilize paid sick leave for this reason.

² The term “substantially similar condition” is not defined in the Emergency Paid Sick Leave Act. At this time, it is unclear how this term will be interpreted and applied when an employee is seeking to utilize paid sick leave for this reason.

Calculating Paid Sick Time

Pursuant to the Emergency Paid Sick Leave Act, paid sick leave is calculated based on the employee's regular rate of pay, or the federal minimum wage or applicable minimum wage of the State or locality where the employee is employed, whichever is greater, **and** the number of hours the employee would otherwise be normally scheduled to work. (emphasis added). (*Id.* at §§ 5110(5)(A)-(B)) (emphasis added). For those employees utilizing leave to care for others or due to a substantially similar condition, reasons four through six enumerated above, the employee shall receive two-thirds of their regular rate of pay or minimum wage, whichever is greater. (*Id.* at § 5110(5)(B)(ii)).

However, there is a cap on the payment of sick leave based on the employee's reason for taking the leave. (*Id.* at §§ 5110(5)(A)(ii)(I)-(II)). Paid sick leave for employees utilizing leave for their own use, reasons one through three noted above, must not exceed \$511 per day and \$5,110 in the aggregate. (*Id.* at § 5110(5)(A)(ii)(I)). Paid sick leave for employees utilizing leave to care for others or due to a substantially similar condition, reasons four through six noted above, must not exceed \$200 per day and \$2,000 in the aggregate. (*Id.* at § 5110(5)(A)(ii)(II)).

For part-time employees or employees with varying schedules week to week, the Emergency Paid Sick Leave Act utilizes the same analysis as the Emergency Family and Medical Leave Expansion Act. (*Id.* at § 5110(5)(C)). The employer must calculate the hours worked by using "a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes paid sick leave, including hours for which the employee took leave of any type." (*Id.* at § 5110(5)(C)(i)). However, if the employee did not work the previous 6-months, the employer must use "the reasonable expectation . . . at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work." (*Id.* at § 5110(5)(C)(ii)).

Exclusions and Exemptions

The law permits health care providers or emergency responders to elect to exclude their employees from coverage under the Emergency Paid Sick Leave Act. (*Id.* at § 5102(a)).

Additionally, the Secretary of Labor is empowered to issue regulations and exclude "certain health care providers and emergency responders from the definition of eligible employee . . . including allowing the employer of such health care providers and emergency responders to opt out" of the requirements of the Emergency Paid Sick Leave Law. (*Id.* at § 5111(1)). Additionally, the Secretary of Labor may exempt "small businesses with fewer than 50 employees from the requirements of [the Federal Paid Sick Leave Law] when the imposition of such requirements would jeopardize the viability of the business as a going concern." (*Id.* at § 5111(2)).

Employer Requirements and Prohibitions

Employers are prohibited from requiring an employee to find coverage while out on qualifying sick leave. (*Id.* at § 5102(d)). Additionally, an employer may not require an

employee to use other accruals before using paid sick time. (Id. at § 5102(e)(B)). Employers may not discipline, discharge, or otherwise discriminate or retaliate against any employee utilizing leave under this law, or who has filed a complaint or participating in a proceeding seeking enforcement of the Emergency Paid Sick Leave Act. (Id. at §§ 5104 (1)-(2)).

Employers must conspicuously post and keep posted a notice prepared by the Secretary of Labor, detailing the requirements of the Emergency Paid Sick Leave Act. (Id. at § 5103 (a)). The Secretary of Labor is required to make said notice publicly available by March 25, 2020. (Id. at § 5103 (a)).

Penalties for failing to comply with the provisions of the Emergency Paid Sick Leave Act are the same as those under the Fair Labor Standards Act (“FLSA”) and include a private right of action for aggrieved employees to collect unpaid sick leave and penalties by the Secretary of Labor. (Id. at §§ 5105 (a)-(b)).

Collective Bargaining Agreements

Nothing in the Emergency Paid Sick Leave Act will diminish rights that an employee is entitled to under a collective bargaining agreement or an existing employer policy³. (Id. at §§ 5107(1)(A)-(C)).

Additionally, “[a]n employer signatory to a multiemployer collective bargaining agreement may, consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations under this Act by making contributions to a multiemployer fund, plan, or program based on the hours of paid sick time each of its employees is entitled to under this Act while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement and for the uses specified under [the Emergency Paid Sick Leave Act]. (Id. at § 5106(a)).

Similarly, [e]mployees who work under a multiemployer collective bargaining agreement into which their employers make contributions as provided in subsection (a) may secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for the uses specified in [the Emergency Paid Sick Leave Act].” (Id. at § 5106(b)).

Future Guidance

By April 2, 2020, the Secretary of Labor is required to issue guidelines to assist employers in calculating paid sick time. (Id. at § 5110(5)(D)).

³ The term “employer policy” is not defined in the Emergency Paid Sick Leave Law. At this time, it is unclear if an employer’s existing sick leave policy, to the extent that it provides equal or greater benefits than the Emergency Paid Sick Leave Law, will satisfy the requirements of the law.

TAX CREDITS

To offset the cost associated with providing paid leave under the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, the Families First Coronavirus Response Act provides a series of refundable tax credits to employers. (Id. at a§ 7001). The tax credits will equal “100 percent of the qualified sick leave wages paid by such employer with respect to such calendar quarter.” (Id. at § 7001(b)(1)). The credits will be capped for leave wages paid under the Emergency Family and Medical Leave Expansion Act at \$511 per day, or \$200 per day where the leave is to care for a family member or child, and under the Emergency Paid Sick Leave Act at \$200 per day for each individual up to \$10,000 in the aggregate. (Id. at §§ 7003(b)(1)-(2)).

INTERPLAY WITH NEW YORK LAW

Effective March 18, 2020, the NY COVID-19 Paid Sick Leave Law provides protections to employees subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19, and requires both private and public employers to provide sick leave to those impacted employees, the amount of leave and whether paid or unpaid to be determined based on the size of the employer. The NY COVID-19 Paid Sick Leave Law mandates that federal law will control unless New York’s law provides benefits in excess of the federal law.

The Emergency Family and Medical Leave Expansion Act allows employees to take job-protected paid leave to care for their son or daughter under 18 years of age where the employee is unable to work (or telework) as a result of a school or place of care closure or because the child care provider is unavailable due to a COVID-19 public health emergency. The Emergency Paid Sick Leave Act also allows employees to utilize paid sick leave for this reason, as well as several other reasons listed above. In contrast, the only reason permissible under the NY COVID-19 Paid Sick Leave Law for an employee to receive paid sick leave is where the employee is subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19. Thus, to the extent an employee must utilize leave other than for a mandatory or precautionary order of quarantine or isolation due to COVID-19, the federal laws provide greater protection and opportunity for employees to utilize leave for reasons related to COVID-19.

It is unclear at this time whether the NY COVID-19 Paid Sick Leave Law will provide monetary benefits in excess of the Emergency Paid Sick Leave Act, since the New York law does not contain a calculation method. However, if the employee is eligible for New York’s Paid Family Leave and disability, there is the potential that the employee could collect a greater benefit with a maximum payment of \$840.70 in Paid Family Leave and \$2,042.92 in disability benefits per week.

Hinman Straub will continue to monitor the guidance from both the federal and state regulatory agencies and provide pertinent updates as information is received. If you have any additional questions regarding the COVID-19 federal or state paid sick leave laws, please contact Sean Doolan, Esq. (sdoolan@hinmanstraub.com), Elena DeFio Kean, Esq. (ekean@hinmanstraub.com) or Kristin Foust, Esq. (kfoust@hinmanstraub.com) at (518) 436-0751.