EMPLOYMENT LAW UPDATE:

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BREAKING NEWS:
President Trump Signs Coronavirus Response Bill that Expands FMLA Rights and Requires Paid Leave for Coronavirus-related Absences.

CONTACT US: Please feel free to contact the Jones Waldo Employment Group with your questions about these new paid leave requirements.

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On March 18, 2020, President Trump signed a coronavirus response bill, which includes the Emergency FMLA Expansion Act and Emergency Paid Sick Leave Act. As described below, these new laws temporarily require employers ***with fewer than 500 employees*** to provide paid and protected FMLA leave for certain coronavirus-related absences, subject to caps. The new laws also provide tax credits to employers to help offset the cost of paid leave. These laws take effect on April 2, 2020.

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PAID FAMILY MEDICAL LEAVE—THE EMERGENCY FMLA EXPANSION ACT ("EXPANSION ACT"): The Expansion Act sets up a new category for entitlement to FMLA leave: section 102(a)(1)(F) leave. This new section enables leave for childcare reasons arising from school and daycare closures "related to a public health emergency." Section 102(a)(1)(F) is only effective "[d]uring the period beginning on the date the [Expansion Act] takes effect, and ending on December 31, 2020.

Section 102(a)(1)(F) alters certain FMLA definitions and adds some of its own. For purposes of 102(a)(1)(F) leave, "eligible employee" means "an employee who has been employed for at least 30 calendar days by the employer." For normal FMLA leave, "employer" is defined as "any person engaged in commerce . . . who employs 50 or more employees for each working

day during each of 20 or more calendar workweeks in the current or preceding calendar year." But, for 102(a)(1)(F) leave, "employer" is defined as "any person engaged in commerce . . . who employs fewer than 500 employees." In other words, in determining who is an "employer," the measure is no longer 50 or more employees, and you no longer look at a 20-week window. If you employ fewer than 500 employees, than you're an "employer" for purposes of 102(a)(1)(F) leave.

To be entitled to expansion act leave, the employee must have a qualifying need to care for their child as the result of a school or daycare closure, as follows:

(1) The employee can't work or telework,
(2) Because the employee has to care for his/her minor child,
(3) Because the child's school has closed or the child care provider is unavailable,
(4) Because of public health emergency—i.e., "an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

Importantly, "child care provider" in this scenario means someone who "receives compensation for providing child care services on a regular basis," so it has to be a professional childcare provider.

There are two types of 102(a)(1)(F) leave—paid and unpaid. Employers can treat the first 10 days of 102(a)(1)(F) leave as unpaid. However, an employee can elect to substitute any accrued vacation, personal, medical, or sick leave for unpaid 102(a)(1)(F) leave. After the first 10 days of 102(a)(1)(F) leave, the second type of leave comes into play—i.e., *paid* leave. Paid leave is calculated based on:

- At least 2/3 of the employee's regular rate of pay, and
- The number of hours the employee would otherwise be normally scheduled.

If the employee's hours vary week to week, then the number is equal to the average number of hours the employee was scheduled to work per day over the 6-month period ending on the date the employee takes the 102(a)(1)(F) leave (including hours of leave). If the employee didn't work during that 6-month period, then the number is 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."

Importantly, there's a cap for 102(a)(1)(F) leave: "In no event shall such paid leave exceed $200 per day and $10,000 in the aggregate."

Generally (subject to certain exceptions), the FMLA requires an employer to restore an employee to the position the employee held when the FMLA leave commenced. However, the Expansion Act modifies this general rule. An employer doesn't have to restore the employment an employee who took 102(a)(1)(F) leave if:

- The employer employs fewer than 25 employees;
- The position held by the employee when the leave commenced no longer exists due to economic conditions or other changes in operating conditions of the

employer that affect employment and are caused by a public health emergency during the period of leave;
- The employer makes reasonable efforts to restore the employee to an equivalent position; and
- If the employer's efforts to restore the employee fail, the employer makes reasonable efforts during the "contact period" to contact the employee if an equivalent position becomes available.

For purposes of 102(a)(1)(F) restoration, "contact period" means 1 year from the date on which the qualifying need related to a public health emergency concludes, or 12 weeks after the 102(a)(1)(F) leave commences, whichever is earlier.

The Expansion Act drastically increases the number of companies that are considered "employers" and thus obliged to provide 102(a)(1)(F) leave. However, the Expansion Act does throw smaller employers a few bones. First, it authorizes the Secretary of Labor to issue regulations to exempt small businesses "with fewer than 50 employees from the requirements of section 102(a)(1)(F)" when the imposition of such requirements "would jeopardize the viability of the business as a going concern."

Second, the Expansion Act limits civil actions by employees against small employers. An employer that *doesn't* meet the definition of employer from section 101(4)(A)(i)—i.e., a company that employs "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year"—is not subject to "section 107(a) for a violation of section 102(a)(1)(F)." In other words, employers that employ fewer than 50 employees are not subject to civil actions by employees. However, those small employers are still subject to actions by the Secretary of Labor.

The Expansion Act requires employees to provide notice. If the necessity for 102(a)(1)(F) is foreseeable, the employee must provide as much notice as is practicable.

The Expansion Act will go into effect 15 days after it is enacted.

PAID SICK LEAVE—THE EMERGENCY PAID SICK LEAVE ACT ("EPSLA"): The Emergency Paid Sick Leave Act ("EPSLA") requires employers to provide "to each employee employed by the employer" paid sick time to the extent that the employee is unable to work (or telework) as a result of certain, enumerated reasons. The reasons for paid sick leave can be broken down into two categories: those related to employee's own health, and those where the employee is caring for others. This breakdown into categories are important because the categories determine how to calculate the amount an employee must be paid for leave. For the first category (the employee's health), the covered reasons for leave are:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; and
- The employee is experiencing the symptoms of COVID-19 and seeking a medical diagnosis;

The category 2 (employee-caretaker) reasons for paid sick leave are:

- The employee is caring for an individual who is subject to an quarantine/isolation order or a self-quarantine-health-care-provider directive;
- The employee is caring for a child because the child's school or place of care has been closed, or the child care provider is unavailable, due to coronavirus; and
- 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.

As with the FMLA Expansion, "employer" is defined as "any person engaged in commerce or in any industry or activity affecting commerce that, for a private entity/person, employs fewer than 500 employees, and for public employers, employs 1 or more employees. For "employee," EPSLA incorporates FLSA's definition in section 3(e), and includes several types of Federal and State employees.

The duration of the sick time to which an eligible employee is entitled depends on whether the employee is full-time or part-time. Full-time employees are entitled to 80 hours of paid sick leave. For part-time employees, the amount of paid sick time is equal to the number of hours that such employee works, on average, over a 2-week period. If the part-time employee's schedule varies week to week to such an extent that the employer can't determine with certainty the number of hours the employee would have worked, the number is 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 the paid sick time," including leave hours. If the employee did not work over that 6-month period, 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" controls.

The amount an employer must pay for paid sick leave depends on which category of leave the employee is using: category 1 (employee's health), or category 2 (employee caretaker). If the leave is under category 1, then the compensation must be the greater of the following:

- The employee's regular rate of pay;
- Minimum wage under FLSA; or
- Minimum wage under state/local law.

If the leave is under category 2 (employee caretaker), then the compensation is 2/3 of the rate of pay described above (i.e., regular rate of pay, or Federal or state minimum wage).

As with the FMLA Expansion Act, there are caps for EPSLA paid sick leave. For category 1 leave, the cap is $511 per day and $5,110 in the aggregate. For category 2 leave, it's $200 per day and $2,000 in the aggregate.

EPLSA contains some prohibitions. As you would expect, it prohibits discrimination and retaliation: employers can't discriminate against an employee who takes EPSLA leave, and files a complaint or participates in an investigation under EPSLA. In addition, an employer who fails to provide paid sick leave under EPSLA will be considered to have failed to pay

minimum wages in violation of section 6 of FLSA, and be subject to the penalties under sections 16 and 17 of FLSA. And an employer who terminates an employee in violation of EPSLA will be considered to be in violation of section 15(a)(3) of FLSA, and be subject to the penalties described in sections 16 and 17 of FLSA.

Some miscellaneous provisions from EPSLA. Paid sick leave is available for immediate use, regardless of how long the employee has been employed by the employer (unlike the Expansion Act that only applies to those who've been employed for at least 30 days). Employees cannot carry paid sick time over from one year to the next. Paid sick time under EPSLA ceases beginning with the employee's next scheduled work shift immediately following the termination of the need for paid sick time. An employer can't condition paid sick leave under EPSLA on the employee finding coverage (i.e., a replacement employee to cover the hours during which the employee is using paid sick time). However, an employer *may* require the employee to follow reasonable notice procedures in order to continue receiving paid sick time, after the first workday an employee receives the paid sick time. The employee can use EPSLA paid sick leave before using other paid leave provided by the employer—employers can't require otherwise. As with the Expansion Act, employers or health care providers or emergency responders may elect not to provide paid sick leave under EPSLA. Employers must post the requirements of EPSLA in conspicuous places. The model notice will be provided by the Secretary of Labor within 7 days of EPSLA's enactment.

As with the Expansion Act, the Secretary of Labor has authority to issue regulations to (1) exclude certain health care providers and emergency responders from the definition of "employee" (allowing such employers to "opt out" of EPLSA; and (2) exempt small businesses with fewer than 50 employees from the requirements of section 5102(a)(5) (caring for children) when the imposition of such requirements would jeopardize the viability of the business as a going concern.

EPSLA takes effect no later than 15 days after enactment and expires on December 31, 2020.

TAX CREDITS TO OFFSET PAID LEAVE EXPENSES: While the FMLA Expansion Act and EPSLA drastically (although only temporarily) expand the leave requirements imposed on employers, these acts also provide tax benefits. For both the Expansion Act leave and EPSLA leave, employers get a tax credit for 100% of the payments for leave. However, there are limits to these tax credits, which match the leave payments caps discussed above.

For Expansion Act leave, the amount of qualified family leave wages taken into account can't exceed $200 (for any day for which the individual is paid qualified family leave wages), and, in the aggregate (for all calendar quarters) $10,000. For EPSLA leave, the amount of qualified sick leave wages taken into account can't exceed $511 (for category 1 leave) or $200 (for category 2 leave). Also, for EPSLA leave, the aggregate number of days for any calendar quarter cannot exceed 10 days over the aggregate number of days taken into account for all preceding calendar quarters.

In addition, the tax credit can't exceed taxed imposed by sections 3111(a) or 3221(a) of the Tax Code. If the credit exceeds the taxes imposed, the excess is treated as an overpayment and will be refunded under sections 6402(a) and 6413(b) of the Tax Code. If the credit exceeds the

taxes imposed, the excess is treated as an overpayment and will be refunded under sections 6402(a) and 6413(b) of the Tax Code.

Finally, any wages required to be paid under FMLA Expansion Act or EPSLA won't be considered wages for purposes of section 3111(a) of the Tax Code or compensation for purposes of section 3221(a) of the Tax Code.

The primary author of this update is management-side employment attorney Paul Smith. Paul is a member of Jones Waldo's Employment Group where he advises employers on leave and other accommodation issues and has received an ADA Professional Training (ADAPT) certification from the National Employment Law Institute. You may feel free to reach out to Paul (psmith@joneswaldo.com), or other members of the Jones Waldo Employment Group, including Mike O'Brien (mobrien@joneswaldo.com), Mark Tolman (mtolman@joneswaldo.com), and Marci Rechtenbach (mrechtenbach@joneswaldo.com).