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OF COUNSEL:
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March 25, 2020

VIA EMAIL

Wheeler Upham Business Client

Re: ***The Family First Coronavirus Response Act
Guidance for Clients – Updated March 25, 2020***

Dear Business Client:

As we told you in our letter of March 20, the Family First Coronavirus Response Act was passed by Congress and signed into law last week. The Department of Labor has now issued guidance regarding the implementation of the Act, so we are writing again to update our letter in light of that guidance. **The updates are in red.**

The Act's paid leave provisions are in effect **from April 1, 2020 to December 31, 2020**. The provisions apply to all but the largest businesses, *i.e.*, those with more than 500 employees. We are writing to give you a summary of the Act's leave provisions that may have a significant impact on your business operations.

The Act has five divisions. Divisions C and E mandate paid leave for employees during the national coronavirus emergency, while Division G provides some relief for the obligations the Act imposes on your businesses.

Division C – Emergency Family and Medical Leave Expansion Act.

- The Family and Medical Leave Act (FMLA) is amended to provide for paid leave related to “qualifying need related to a public health emergency.”
- The standard requirements for FMLA are set aside for this new paid leave mandate.
 - It applies to any employer with fewer than 500 employees.
 - Employees are eligible if they have been employed for 30 calendar days.
- “Qualifying need related to a public health emergency” means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, **as a result of an isolation or shelter-in-place order due to a public health emergency** (e.g., the current coronavirus pandemic).

- *All full-time and part-time employees within the United States are counted when determining if an employer has fewer than 500 employees. This includes employees on leave, temporary employees who are jointly employed with another employer, and day laborers supplied by a temporary agency with whom the employer has a continuing employment relationship. Independent contractors as determined by the Fair Labor Standard Act ("FLSA") are excluded from the calculation. A corporation and its parent entity are considered separate employers unless they are joint employers under the FLSA. If two entities are found to be joint employers, all common employees must be counted in determining employer coverage.*
- *Employers with fewer than 50 employees seeking to be exempted from providing child-care related paid sick leave and expanded family and medical leave should document why compliance with the leave requirement would jeopardize the viability of the business as a going concern. The documentation criteria will be addressed in more detail in forthcoming regulation.*
- *Employers should not send any material to the Department of Labor (DOL) when seeking small business exemption. Stay tuned.*
- *The Secretary of Labor has the authority to except certain healthcare providers and first responders from eligibility. Stay tuned.*
- Employees get 12 weeks of both paid and unpaid leave.
 - The first 10 days of leave is unpaid.
 - *However, the employee is entitled to use paid PTO, sick, or annual leave to cover this period.*
 - The next 10 weeks is paid at 2/3 of the employee's regular pay up to \$200 a day to a maximum of \$10,000.
 - Part time employees only get paid for the hours they otherwise would have normally worked.
 - Employees with varying schedules are to be paid the number of hours they would have worked based on an average of the hours worked in the 6 months prior to the start of leave.
- Employees must notify employers in advance of their intent to take leave.
- Employees are entitled to restoration after taking leave.
- Employees cannot be retaliated against for taking leave.
- Presumably, the 12-week annual FMLA leave cap still applies. This would mean that someone who has taken some of their annual FMLA leave would not get the full 12 weeks of benefits provided by the new law. Nor, if they can't work due to some other reason, would they be entitled to this new leave. Guidance from the Secretary Labor will answer some of these questions.
- Presumably, the new leave for child care purposes will end when school was normally scheduled to end for the employee's children.
 - *Get this information from the employee upon their requesting leave.*
- An employer of a health care provider or an emergency responder may elect to exclude employees from these provisions.
 - *This provision seems to contradict that earlier provision that says that It's within the Secretary of Labor's, not the employer's, authority to exclude first responders and health care workers from the Act. Perhaps the Secretary will use that authority to define "first responder" and "health care workers."*

Division E – Emergency Paid Sick Leave Act.

- This is in addition to the FMLA leave provided in Division C. **The paid sick leave and expanded family and medical leave requirements are not retroactive. Employers who provided paid leave for qualifying reasons identified in the Emergency Paid Sick Leave Act prior to the Act going into effect cannot deny eligible employees paid sick leave required by the Act because they provided paid sick leave prior to the effective date.** Paid sick leave after April 1 counts toward 12 weeks of emergency annual leave, *i.e.*, an employer only has to pay an eligible employee 10 days of paid sick leave and 10 weeks of emergency annual leave. **The Secretary of Labor’s guidance that has been published thus far does not answer the question as to whether an employee’s use of FMLA leave before April 1 for reasons other than FMLA qualifying reasons counts towards the annual 12-week cap of FMLA leave.**
- An employee gets 2 weeks of paid leave if the 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 individual 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 condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
- An employee who is a health care provider or an emergency responder may be excluded at the election of the employer from this benefit.
- Full time employees get 80 hours of paid leave
- Part-time employees get the average number of hours they would have worked over a 2-week period.
- For paid sick leave taken for an employee's own conditions, the employee will be compensated at the higher of his or her regular rate or the applicable minimum wage, up to \$511 per day and \$5,110 in total.
- For leave taken to care for another individual or for a child whose school or care is unavailable will be compensated at two-thirds the rate the employee would otherwise receive, up to \$200 per day and \$2,000 in total.
- Employers cannot require the employee to find a replacement employee to cover their shift.
- Available to all employees regardless of when they started working for the employer.
- An employer may not require an employee to use other available paid leave to cover this benefit.

- Employers must post a notice of rights to be issued by the Secretary of Labor as soon as it is issued.
 - *As a practical note, if employees are working remotely, you may need to distribute it to them or post on your employee website.*
- Retaliation against employees for taking this leave or who sue to obtain this benefit is prohibited.
- Standard FLSA enforcement provisions apply for violation of this Act, which would include enforcement actions by the Secretary labor with penalties, private suits for lost wages, liquidated damages in the same amounts, and attorneys' fees.

Division G – Tax Credits for Paid Sick and Paid Family Medical Leave.

The Act offers some tax relief to employers who will now be required to provide paid leave and for those employers who continue to provide health coverage to employees who take Emergency FMLA or Emergency Paid Sick Leave. *Wheeler Upham recommends that you consult with your accountant and/or payroll process provider about these provisions. Regulations and guidance are expected to be forthcoming from the Secretary of the Treasury regarding implementation of these provisions.*

- A tax credit is available for up to \$200 per day for Emergency FMLA and up to \$511 per day for Emergency Paid Sick Leave payments.
- The credit is calculated on an individual employee basis for a total of 10 days paid leave.
- The credit is taken on payroll tax paid for all employees of the employer but cannot exceed the tax that is due.
 - Any excess credit can be treated as an overpayment entitling the employer to a refund.
- Employers should maintain records on employees who qualify for leave, which include the reasons for the leave and the days taken in order to substantiate qualifications for the credit. For those who have employees who take Emergency FMLA or Emergency Paid Sick Leave, employers may receive a credit for:
 - amounts paid toward maintaining the employees' health plan, and
 - amounts excluded from an employee's gross income as it related to federal income tax.
 - This credit is in addition to credit for wages paid for qualifying leave, but it cannot exceed the credit available for Emergency FMLA and Emergency Paid Sick Leave.
 - This credit is to be requested on quarterly tax returns. It will be included in an employer's gross income.
 - *The Trump administration has said it will advance money earlier for employers who can't wait that long. No details have been provided.*
- Self-employed individuals may be entitled to tax credits.

The DOL states that it will observe a temporary period of non-enforcement for the first 30 days after the leave requirements take effect with respect to employers who have acted reasonably and in good faith compliance with the FFCRA. "Good faith" exists when (1) the employer remediates the violations and allows the employee to take entitled leave as soon as practicable, (2) the

violations were not willful, and (3) the employer provides the DOL with a written commitment of compliance in the future.

The new law is both new and complex. Please contact either of us after reading this updated summary to discuss how your organization may be affected.

Cordially,

WHEELER UPHAM, P.C.

Glenn L. Smith

Michael J. TerBeek