

New Department of Labor Guidance Clarifies Questions on Paid Leave Requirements of the Families First Coronavirus Response Act

The U.S. Department of Labor (“DOL”) has provided new [guidance](#) responding to many of the questions left unresolved by the text of the Families First Coronavirus Response Act (the “Act”).

The Act created a new entitlement to up to two weeks of Emergency Paid Sick Leave (“EPSL”) and up to 10 additional weeks of Public Health Emergency Leave (“PHEL”). Both new programs require employers to provide paid leave in certain designated circumstances. The extended leave provisions of PHEL only apply to employees caring for school-age children or younger and who are unable to work or telework because schools and care-givers are not open.

The Act also provides for a payroll tax credit intended to reimburse employers for the cost of the paid leave.

Here is a summary of the key matters addressed:

- **The effective date of the Act’s requirements is April 1, 2020.** (The Act left the exact effective date to be determined by DOL but no later than April 2.)
- **The Act is not retroactive.**
- Accordingly, EPSL and PHEL only apply for the period from April 1, 2020 to December 31, 2020.
- Therefore, **any leave taken by employees during March or earlier will not result in any paid-leave entitlement** under either EPSL or PHEL.
- If the employer provided paid time off prior to April 1, 2020, such time off is not applied against the new obligations in the Act. **EPSL and PHEL are new obligations that begin on April 1.**
 - Example: An employee qualifies for paid leave under one of the categories in the Act. Such employee took two weeks sick leave in March and exhausted employer PTO under the employer’s policies.
 - If such employee remains unable to work or telework under one of the categories in the Act, the employee would be entitled to two *new* (additional) weeks of EPSL under the Act, beginning on April 1.
- PHEL is the only type of leave provided under the Family and Medical Leave Act (“FMLA”) that requires pay. Leave that was taken prior to April 1 would not be subject to the paid-leave requirement, but PHEL taken April 1 and later must be paid subject to the limitations in the Act.

- The PHEL leave ends upon the end of the triggering condition (e.g., if schools are no longer closed).
 - Example: An employee caring for a school-age child whose school is closed is unable to telework. The employee took leave starting on March 16. Schools cease being closed on May 4.
 - The employee would not be eligible for PHEL for the period from March 16 to March 31 since the Act would not have been in effect; employer PTO policies would apply during such period.
 - The employee will be eligible for PHEL for the period from April 1 to May 3 regardless of employer PTO policies.
 - The employee will no longer be eligible for PHEL beginning on May 4.
- PHEL is available to employees who were employed by the employer for at least 30 days prior to the request for leave. (This is a much shorter time period that usual FMLA benefits.) Therefore, if an employee seeks PHEL starting on April 1, that employee would have needed to have been employed by March 2, 2020 for the paid-leave requirement to apply.
- For purposes of the application of the 500-employee threshold, DOL will apply the “integrated employer test” which it has used historically to determine thresholds under the FMLA.
- Employers who seek an exemption from the requirement due to small size (fewer than 50 employees) and economic hardship are advised to retain documentation of the hardship. The criteria for the exemption will be set forth in future regulations. At this stage, employers seeking the exemption are not being required to apply to the DOL for an exemption.
- DOL will not enforce the requirements of the Act prior to April 18, 2020 if employers are making a good-faith effort to comply.

Subsequent legislation is expected to address the timing of the payroll tax credit that is intended to provide the means for employers to provide the paid leave.

Such legislation may also provide other means to keep employees on an employer’s payroll even if businesses are closed or if there has been a negative shift in demand. Employers cannot deny the EPSL or PHEL to qualifying employees, but other incentives to maintain employment may be more advantageous to both parties. The EPSL and PHEL benefits will run to the end of December, as will the employer’s related tax credit. Other incentives may run only to June 30. Therefore, it may be an option to “reserve” the paid leave until after June 30.

More detailed information on the Act can be found in [this article](#).

Vandenack Weaver attorneys are monitoring all such developments and can assist businesses with the many planning issues that arise.