Chapter 1—Emergency Family and Medical Leave Expansion

1

¶100 Public Health Emergency Leave

SUMMARY OF NEW LAW

The Family and Medical Leave Act is expanded to require employers with fewer than 500 employees to offer eligible employees paid FMLA leave if the employee is unable to work (or telework) due to a need to care for the employee's minor child because a COVID-19 public health emergency has forced the closure of the child's school or place of care. Employees must provide employers with notice of the need for such leave, to extent foreseeable and practicable. Entitlement to public health emergency leave begins April 1, 2020 and ends December 31, 2020.

BACKGROUND

The Family and Medical Leave Act (FMLA) generally provides eligible employees of employers with 50 or more employees with 12 workweeks of unpaid leave during any 12-month period in certain situations (FMLA Secs. 101(4); 102(a)(1)). Leave is available due to the birth of the employee's child; to the placement of a child with the employee for adoption or foster care; the serious health condition of the employee's family member; the serious health condition of the employee; or in certain situations where the employee's family member is on covered active duty in the Armed Forces (FMLA Sec. 102(a)(1)(A-E).

NEW LAW EXPLAINED

Public health emergency leave.—During the period beginning on April 1, 2020 and ending December 31, 2020, entitlement to FMLA leave is expanded to include leave related to a qualifying need related to a public health emergency (FMLA Sec. 102(a)(1)(F), added by Act Sec. 3102(a) of the Families First Coronavirus Response Act (P.L. 116-127).

Qualifying need. A "qualifying need related to a public health emergency" means the employee is unable to work (or telework) due to a need to care for the employee's son or daughter under 18 years old if, due to a public health emergency:

(1) The school or place of care has been closed, or

(2) The child care provider of the employee's child is unavailable (FMLA Sec. 110(a)(2)(A), as added by Sec. 3102(b) of the Families First Act).

Comment: "Son or daughter" includes: the employee's biological or adopted child under 18 years of age; a legal ward, or a child for whom the employee stands *in loco parentis*. Also included is an adult child who is incapable of self-care due to a mental or physical disability (29 CFR §826.10).

Public health emergency. A public health emergency is an emergency related to COVID-19 declared by a Federal or State or local authority (FMLA Sec. 110(a)(2)(B), as added by the Families First Act).

Child care provider. For purposes of the emergency leave, a "child care provider" is one who is compensated for providing child care services on a regular basis, including eligible child care providers offering subsidized child care to low-income working families (FMLA Sec. 110(a)(2)(C), as added by the Families First Act).

School. Public health emergency leave is available to parents of children whose "elementary" and "secondary" schools have closed due to a public health emergency. This provision applies to a nonprofit institutional day or residential school (including a public charter school) that provides elementary or secondary education as determined under state law, except not beyond grade 12 (FMLA Sec. 110(a)(2)(D), as added by the Families First Act).

Employers with fewer than 500 employees are generally required to provide public health emergency leave to employees employed for at least 30 days (FMLA Sec. 110(a)(1)(B), as added by the Families First Act). See ¶110.

Notice to employer. When an employee's need for public health emergency leave is foreseeable, the employee must provide the employer with notice of such leave. Notice is required to the extent such notice is practicable (FMLA Sec. 110(c), as added by the Families First Act).

Under regulations issued by the Labor Department, notice may not be required in advance, and may only be required after the first workday for which an employee takes expanded family leave. Employers may require oral notice, as well as enough information to determine whether the requested leave is covered by the Act (29 CFR §826.90(c)). Employees must document their need for leave by supplying the employer (prior to taking leave), with, among other things, an oral or written statement that

NEW LAW EXPLAINED

the employee is unable to work due to the qualified reason for the leave; the name of the school or child care provider that has closed; a representation that no other suitable person will be caring for the child while expanded leave is taken; and any additional information as needed for the employer to support a request for tax credits. The employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided (29 CFR § 826.100).

Expert Guidance: Notice to employees. According to the law firm Ogletree Deakins, "The FFCRA requires eligible employers to maintain, in a conspicuous location, where notices to employees are customarily posted, in all work locations, a notice prepared or approved by the Secretary of Labor. In addition, and particularly given the prevalence of employees working remotely due to COVID-19, employers may provide notice through email or direct mail to employees or by posting on an employee-facing intranet or external website. The model notice posting applicable to private employers is now available in English, Spanish, and Korean. The DOL permits emailing the poster to those already teleworking." Michael M. Shetterly, Matthew K. Johnson and Sarah J. Platt, The Families First Coronavirus Response Act FAQs: The FMLA Amendments and paid Sick Leave Requirements of the New Law (https://ogletree.com/solutions/coronavirus-covid-19-resource-center/). The model notice posting is at dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

Paid leave. After the initial 10 days of public health emergency leave (which may be unpaid), employers must provide paid leave (FMLA Sec. 102(c), as amended by Act Sec. 3102(a)(2) of the Families First Act). See ¶120.

▶ **Effective date.** The Act takes effect April 1, 2020 (not later than 15 days after the date of enactment (Act Sec. 3106 of the Families First Act).

Law Source: Law at 1027, ¶1031, ¶3005, and ¶3013.

— Act Sec. 3102(a)(1) of the Families First Coronavirus Response Act (P.L. 116-127), amending FMLA Sec. 102(a)(1) by adding subsection (F).

— Act Sec. 3102(a)(2) of the Families First Act, amending FMLA Sec. 102(c).

— Act Sec. 3102(b) of the Families First Act, amending Title I of the FMLA by adding Sec. 110.

— Act Sec. 3106, of the Families First Act, providing the effective date.

¶110 Covered Employers/Eligible Employees

SUMMARY OF NEW LAW

The public health emergency leave requirement (see ¶100) generally applies to employers with fewer than 500 employees. Exemptions for businesses with fewer than 50 employees or for employees deemed to be health care providers and emer-

SUMMARY OF NEW LAW

gency responders may apply. Employees employed by the employer for at least 30 calendar days are eligible for public health emergency leave.

BACKGROUND

Generally, to be covered by the FMLA, a private employer must employ 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year (FMLA Sec. 101(4)). In addition, a company must employ at least 50 employees within 75 miles of a worksite before it is required to provide FMLA leave (FMLA Sec. 101(2)(B)(ii)).

To be eligible to take FMLA leave, an employee must have worked for an employer for at least 12 months total. In addition, the employee must have worked at least 1,250 hours during the 12-month period immediately before the leave is scheduled to begin (FMLA Sec. 101(2)(A)).

NEW LAW EXPLAINED

Covered employers and eligible employees for public health emergency leave. — The public health emergency leave requirement applies to employers with fewer than 500 employees, although exemptions for businesses with fewer than 50 employees or for health care providers and emergency responders may apply. Employees employed by the employer for at least 30 calendar days are eligible for public health emergency leave (FMLA Sec. 110(a)(1), as added by Act Sec. 3102(b) of the Families First Coronavirus Response Act (P.L. 116-127).

Fewer than 500 employees. For purposes of public health emergency leave, the Families First Act replaces the FMLA's "50 or more employees during a 20-week period" threshold with a requirement that all employers with fewer than 500 employees must provide the public health emergency leave (FMLA Sec. 110(a)(1)(B), as added by the Families First Act).

According to the Wage and Hour Division of the Department of Labor, an employer must provide leave if, at the time the employee's leave is taken, the employer employs fewer than 500 full-time and part-time employees within the United States. Typically, a corporation, including its separate establishments or divisions, is considered to be a single employer for purposes of the 500-employer threshold. Employers should include the following employees when making this determination:

- Employees on leave
- Temporary employees who are jointly employed by the employer and another employer (regardless of whether the jointly employed employees are maintained on the employer's payroll); and
- Day laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client firm if there is a continuing employment relationship).

NEW LAW EXPLAINED

Note that independent contractors are not employees for purposes of the 500-employee threshold (*Families First Coronavirus Response Act: Questions and Answers*, Q/A-2, issued by the Department of Labor, dol.gov/agencies/whd/pandemic/ffrca-questions).

Relief for small employers. The Secretary of Labor is authorized to issue regulations that would exempt small businesses with fewer than 50 employees from compliance with the leave requirement if compliance would jeopardize the viability of the business (FMLA Sec. 110(a)(3)(B), added by the Families First Act).

Under Labor Department regulations issued pursuant to the Act, for a small business to claim the exemption, an authorized officer of the business must determine that at least one of the following conditions is satisfied:

- Providing the expanded family leave would cause the employer's expenses to exceed available revenues remedies and cause the small business to cease operating at minimal capacity;
- Absence of employees with specialized knowledge or skills would entail a substantial risk to the financial health of the business; or
- The small business lacks enough workers to perform the work of the employees requesting the expanded family leave.

The employer must retain for its records documentation that such a determination has been made. The documentation should not be sent to the Wage and Hour Division (29 CFR § 826.40(b)).

Eligible employees. Employees who have been employed for at least 30 calendar days by the employer are eligible for public health emergency leave (FMLA Sec. 110(a)(1)(A), as added by the Families First Act). This includes a rehired employee who had been laid off by the employer (not earlier than March 1, 2020), had worked for the employer for not less than 30 of the last 60 calendar days prior to the layoff, and was then rehired by the employer (FMLA Sec. 110(a)(1)(A)(ii), added by Act Sec. 3605 of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136).

> **Expert Guidance:** As to what qualifies as "30 calendar days" under the Act, the law firm Ogletree Deakins comments: "The employee must have been on payroll (again, any time worked as a temporary employee for the employer also counts as being on payroll) for 30 calendar days, no matter how many days he or she worked"(Michael M. Shetterly, Matthew K. Johnson and Sarah J. Platt, The Families First Coronavirus Response Act FAQs: the FMLA Amendments and Paid Sick Leave Requirements of the New Law, https://ogletree.com/solutions/coronavirus-covid-19-resource-center/).

Health care workers and emergency responders. The Secretary of Labor is authorized to issue regulations excluding health care providers and emergency responders from the definition of eligible employee (FMLA Sec. 110(a)(3)(A), as added by the Families First Act).

> Regulations issued by the Labor Department offer broad definitions of "health care provider" and "emergency responder" for purposes of this exemption. For example, the definition of "health care provider" encom-

NEW LAW EXPLAINED

passes all employees of hospitals, doctor's offices, nursing homes, home health providers, etc., as well as workers making medical products, including medical equipment, tests and vaccines. The governor of a State has the authority to designate individuals as health care providers or emergency responders for this purpose (29 CFR § 826.30(c)).

Federal employees. Most federal employees are not entitled to the expanded family and medical leave because while the Act only amended Title I of the FMLA, most federal employees are covered instead by Title II of the FMLA (*Families First Coronavirus Response Act: Questions and Answers*, Q/A-53, issued by the Department of Labor, dol.gov/agencies/whd/pandemic/ffrca-questions). In addition, the Director of the Office of Management and Budget has the authority under the Act to exclude some categories of the U.S. Government Executive Branch with respect to expanded family and medical leave (FMLA Sec. 110(a)(4), as added Act Sec. 3604(a) of the CARES Act). However, Congressional employees otherwise covered by the FMLA who have been employed for at least 30 calendar days are covered (FMLA Sec. 110(a)(1)(A)**(iii)[sic]**, as added by Act Sec. 19008 of the CARES Act).

Impact of regulations. The Families First Act authorizes the Labor Department to issue regulations as necessary to implement the Act, including to ensure consistence between the Act and existing provisions of the FMLA (FMLA Sec. 110(a)(3), as added by the Families First Act). Regulations were issued by the Labor Department's Wage and Hour Division on April 6, 2020 (85 FR 19326).

▶ **Effective date.** The Act takes effect April 1, 2020 (not later than 15 days after the date of enactment) (Act Sec. 3106 of the Families First Act).

Law source: Law at ¶1027, 1031, ¶2121, ¶2123, ¶2240, and ¶3013.

— Act Sec. 3102(b) of the Families First Coronavirus Response Act (P.L. 116-127), amending Title I of the FMLA by adding Sec. 110.

— Act Sec. 3106 of the Families First Act, providing the effective date.

— Act Sec. 3605 of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136), adding FMLA Sec. 110(a)(1)(A)(ii).

— Act Sec. 3604(a) of the CARES Act, adding FMLA Sec. 110(a)(4).

— Act Sec. 19008 of the CARES Act, adding FMLA Sec. 110(a)(1)(A)**(iii)[sic].**

¶120 Relationship to Paid Leave

SUMMARY OF NEW LAW

Employers must provide paid leave for public health emergency leave after the initial 10 days of leave, which employers may designate as unpaid leave.

BACKGROUND

Leave under the Family and Medical Leave Act is normally unpaid leave: employers are not required to compensate employees for time spent on FMLA leave. In addition, the FMLA generally gives employers the option of requiring employees to take paid leave that they have already earned at the same time as all or part of the 12-week FMLA leave entitlement (FMLA Sec. 102(c)).

NEW LAW EXPLAINED

Relationship to paid leave.—Employers must provide paid leave for public health emergency leave after the initial 10 days of leave, which employers may designate as unpaid leave. Paid leave is capped at $200 per day and $10,000 in the aggregate (FMLA Sec. 102(c), as amended by Act Sec. 3102(a)(2) of the Families First Coronavirus Response Act (P.L. 116-127) and FMLA Sec. 110(b), as added by Act Sec. 3102(b) of the Families First Act).

While employers may require employees to take the first 10 days of public health emergency leave on an unpaid basis, the employee may elect (or the employer may require the employee) to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave, as set forth in FMLA Sec. 102(d)(2)(B) (FMLA Sec. 110(b)(1)(B), as added by Sec. 3102(b) of the Families First Act).

Paid leave commences. After the initial 10 days of leave, employers must provide paid leave equal to not less than two-thirds of the employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work, or the number of hours calculated for employees who have varying schedules (FMLA Sec. 110(b)(2)(B)(i), as added by Sec. 3102(b) of the Families First Act).

> **Expert Guidance:** According to the law firm Ogletree Deakins: "After the first two weeks of [public health emergency leave] (Congress said 10 days, but the concept of days does not align with the FMLA), the [Act] offers paid leave for up to another 10 weeks (depending upon need and whether the employee has already exhausted some FMLA leave for other qualifying reasons). During the last 10 weeks of leave, an employer must pay the employee two-thirds of the employee's average rate of pay (i.e., total compensation other than discretionary bonuses) over the past six months, subject to a statutory cap of $200 per day and $10,000 total (the aggregate maximum of all paid FMLA leave under this provision). An employer may choose to pay more, but tax credits will be limited to the amount required. Employers with unions can use multiemployer collective bargaining agreement plans to pay out these amounts so long as the plans are amended to make the payments provided, and the employer funds the plan to pay for the leave." (Michael M. Shetterly, Matthew K. Johnson and Sarah J. Platt, The Families First Coronavirus Response Act FAQs: The FMLA Amendments and paid Sick Leave Requirements of the New Law, (https://ogletree.com/solutions/coronavirus-covid-19-resource-center/)).

Calculating paid leave for part-time workers or those with varying hours. Where an employee's schedule varies from week to week and the employer is unable to determine with certainty the number of hours the employee would have worked if

NEW LAW EXPLAINED

the employee had not taken leave, the hours are to be calculated based on: 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 and, if the employee did not work over such 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 (FMLA Sec. 110(b)(2)(C), as added by Sec. 3102(b) of the Families First Act).

Cap on paid leave. An employer is not required to pay more than $200 per day and $10,000 in the aggregate for each employee for paid public health emergency leave (FMLA 110(b)(2)(B)(ii), as added by Sec. 3102(b) of the Families First Act and amended by Act Sec. 3601 of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136).

▶ **Effective date.** The Act takes effect April 1, 2020 (not later than 15 days after the date of enactment) (Act Sec. 3106 of the Families First Act).

Law source: Law at 1027, ¶1031, ¶2118, ¶3005, and ¶3013.

— Act Sec. 3102(a)(2) of the Families First Coronavirus Response Act (P.L. 116-127), amending FMLA Sec. 102(c).

— Act Sec. 3102(b), of the Families First Act, amending Title I of the FMLA by adding Sec. 110(b).

— Act Sec. 3106 of the Families First Act, providing the effective date.

— Act Sec. 3601 of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136), amending FMLA Sec. 110(b)(2)(B), as added by the Families First Act.

¶130 Restoration to Position

SUMMARY OF NEW LAW

The Family and Medical Leave Act's job restoration requirements do not apply to employees of an employer with fewer than 25 employees in situations where public health emergency leave is taken.

BACKGROUND

Employees returning from leave under the FMLA generally have the right to be restored to the same or an equivalent job position with the same or equivalent benefits, pay and other terms and conditions of employment. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges and status (FMLA Sec. 104(a)(1)).

NEW LAW EXPLAINED

Job restoration provisions suspended for smaller employers.—The FMLA's job restoration requirements do not apply to employees of an employer with fewer than 25 employees as long as the following conditions are met:

A. The employee takes leave under the public health emergency leave provision.

B. The position held by the employee when the leave commenced no longer exists, due to either economic conditions or other changes in the employer's operating conditions that affect employment and are caused by a public health emergency during the period of leave.

C. The employer makes reasonable efforts to restore the employee to a position equivalent to the position that the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.

D. If the employer's reasonable efforts under subparagraph (C) fail, the employer makes reasonable efforts for a one-year period to contact the employee if an equivalent position becomes available. The one-year period begins on the earlier of the date on which the qualifying need related to a public health emergency ends; or 12 weeks following the leave's commencement (FMLA Sec. 110(d), added by Act Sec. 3102(b) of the Families First Coronavirus Response Act (P.L. 116-127)).

Comment: Note that federal agencies are required to interpret requirements in the FMLA and the Families First Act in a consistent manner (FMLA Sec. 110(a)(3)(C), as added by Act Sec. 3611(7) of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136). Regulations issued by the Labor Department explain that in most instances, apart from the exemption for employers with fewer than 25 employees, employers are required to provide the same (or a nearly equivalent) job to an employee who returns to work following leave. However, employees are not protected from layoffs and other employment actions that would have affected the employee regardless of whether leave was taken. In addition, job restoration may be denied to key eligible employees, including the highest paid 10 percent of all employees (29 CFR § 826.130).

▶ **Effective date.** The Act takes effect April 1, 2020 (not later than 15 days after the date of enactment) (Act Sec. 3106 of the Families First Act).

Law source: Law at ¶1027, ¶1031, ¶2129, and ¶3013.

— Act Sec. 3102(b) of the Families First Coronavirus Response Act (P.L. 116-127), amending Title I of the FMLA by adding Sec. 110(d).

— Act Sec. 3106, providing the effective date.

— Act Sec. 3611(7) of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136), amending FMLA Sec. 110(a)(3), as added by the Families First Act.

¶140 Employment Under Multi-Employer Bargaining Agreements

SUMMARY OF NEW LAW

Under multiemployer bargaining agreements, employers may satisfy their obligations regarding the public health emergency leave provisions by making contributions to a multiemployer fund that permits such contributions. Employees who work under a multiemployer collective bargaining agreement and whose employers pay into a multiemployer plan may access emergency paid leave under the Families First Coronavirus Response Act.

BACKGROUND

The Family and Medical Leave Act requires an employer with 50 or more employees (within a 75-mile radius) to give eligible employees 12 weeks of unpaid leave for births, adoptions, and family illnesses. While this leave can be unpaid, many employers provide paid FMLA leave.

FMLA regulations require an employer to continue contributing to a multiemployer health plan on behalf of an employee on FMLA leave, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers who are party to the plan.

In light of the urgent need created by the COVID-19 pandemic, expanded emergency FMLA provisions, including provisions for emergency paid leave, have been enacted.

NEW LAW EXPLAINED

Special rules for multiemployer bargaining agreements.— An employer who is a signatory to a multiemployer collective bargaining agreement, consistent with its bargaining obligations and its collective bargaining agreement, may fulfill its obligations (see ¶ 120) under FMLA Sec. 110(b)(2), as added by the Families First Coronavirus Response Act (P.L. 116-127), 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 (FMLA Sec. 110(b)(2), added by Act Sec. 3103(a) of the Families First Act).

This special rule applies if 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 (see ¶ 110) under FMLA Sec. 102(a)(1)(F), as added by the Families First Act. If such an arrangement is not in place, individual employers are still obligated to provide expanded emergency FMLA benefits under the Families First Act. (FMLA Sec. 102(a)(1)(F), added by Act Sec. 3103(a) of the Families First Act).

> **Comment:** An employer may satisfy its obligations regarding the expanded emergency FMLA leave by other means, provided that those means are consis-

NEW LAW EXPLAINED

tent with its bargaining obligations and collective bargaining agreement (*Families First Coronavirus Response Act: Questions and Answers*, issued by the Department of Labor; https://www.dol.gov/agencies/whd/pandemic/ffcra-questions).

Employees. Employees who work under a multiemployer collective bargaining agreement into which their employers make contributions 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 (see ¶110) (FMLA Sec. 102(a)(1)(F), added by Act Sec. 3103(b) of the Families First Act).

▶ **Effective date.** The Act takes effect April 1, 2020 (not later than 15 days after the date of enactment) (Act Sec. 3106 of the Families First Act).

Law source: Law at ¶1028, ¶1031, ¶3005, and ¶3013.

- Act Sec. 3103(a) of the Families First Coronavirus Response Act (P.L. 116-127), adding FMLA Sec. 110(b)(2).
- Act Sec. 3103(a) of the Families First Act, adding FMLA Sec. 102(a)(1)(F).
- Act Sec. 3106, providing the effective date.

¶150 Special Rule for Certain Employers

SUMMARY OF NEW LAW

Businesses with fewer than 50 employees are exempt from civil damages in employee-initiated lawsuits for violations involving the extended emergency FMLA leave.

BACKGROUND

Family and Medical Leave Act (FMLA) rights are enforceable through civil actions by employees who may sue for damages and equitable relief. Further, the Department of Labor may bring a civil suit to recover damages for rights violated under the FMLA. Any amounts recovered are held in a special deposit account and paid to each affected employee. The DOL also may bring suit against employers to restrain interference violations of the law, including withholding payment of wages, salary, employment benefits, or other compensation, plus interest, that is due to eligible employees. The DOL may seek equitable relief, including employment, reinstatement, and promotion, in U.S. district courts.

NEW LAW EXPLAINED

Small employers exempted from civil lawsuits by employees.— Employers with fewer than 50 employees are exempted from civil FMLA damages in an FMLA lawsuit arising out of the public health emergency leave provisions of the Families First

NEW LAW EXPLAINED

Coronavirus Response Act (P.L. 116-127), thus shielding smaller employers from being liable for back pay or liquidated damages (Act Sec. 3104 of the Families First Coronavirus Response Act (P.L. 116-127), as amended by Act Sec. 3611(4) of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136)).

Comment: Although these small employers are protected from employee-initiated lawsuits for any violations of the expanded emergency FMLA provisions of the Families First Act, these employers would remain subject to civil actions brought by the Labor Department, which could continue to bring enforcement actions for violations.

▶ **Effective date.** The Act takes effect April 1, 2020 (not later than 15 days after the date of enactment) (Act Sec. 3106 of the Families First Act).

Law source: Law at ¶1029, ¶1031, and ¶2129.

- Act Sec. 3104 of the Families First Coronavirus Response Act (P.L. 116-127), as amended by Act Sec. 3611(4) of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136).
- Act Sec. 3106, providing the effective date.

¶160 Special Rule for Health Care Providers and Emergency Responders

SUMMARY OF NEW LAW

An employer of a health care provider or emergency responder may choose to exempt these employees from the application of the public health emergency leave provisions.

BACKGROUND

The Family and Medical Leave Act (FMLA) defines the term "health care provider" as (1) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or (2) any other person determined by the Secretary of Labor to be capable of providing health care services. However, the FMLA does not contain a definition of "first responder."

As the COVID-19 pandemic unfolds, health care facilities nationwide are experiencing a shortage of trained health care providers, as well as equipment and supplies.

NEW LAW EXPLAINED

Health care providers and emergency responders may be exempted from expanded FMLA provisions.—Under the Families First Coronavirus Response Act (P.L. 116-127), employers who employ health care providers or emergency responders may choose to exempt those employees from the newly-enacted expanded emergency

NEW LAW EXPLAINED

FMLA provisions (see ¶ 100) (Act Sec. 3105 of the Families First Coronavirus Response Act (P.L. 116-127)).

The Secretary of Labor is authorized by the Families First Act to exclude certain health care providers and emergency responders from the definition of "eligible employees" under the expanded emergency provisions (FMLA Sec. 110(a)(1)(A), as added by the Families First Act).

Health care providers. The FMLA statute itself defines the term "health care provider" as including (1) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or (2) any other person determined by the Secretary to be capable of providing health care services (FMLA Sec. 101(6)).

However, the Department of Labor has clarified that, for purposes of the expanded emergency FMLA, a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This definition includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions (*Families First Coronavirus Response Act: Questions and Answers*, issued by the Department of Labor; https://www.dol.gov/agencies/whd/pandemic/ffcra-questions).

According to the DOL, this definition of health care provider includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's, territory's, or the District of Columbia's response to COVID-19.

First responders. The Department of Labor has clarified the definition of "emergency responders," for purposes of the expanded emergency FMLA, as including anyone necessary for the provision of transport, care, health care, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This "first responders" definition also includes any

NEW LAW EXPLAINED

individual whom the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's, territory's, or the District of Columbia's response to COVID-19.

▶ **Effective date.** The Act takes effect April 1, 2020 (not later than 15 days after the date of enactment) (Act Sec. 3106 of the Families First Act).

Law source: Law at ¶1030 and ¶1031.

- Act Sec. 3105 of the Families First Coronavirus Response Act (P.L. 116-127).
- Act Sec. 3106, providing the effective date.