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Significant changes from previous edition are highlighted.

Responding to the COVID-19 Pandemic

The information in this publication is general in nature. It cannot—and should not—replace consultation with a competent legal professional. Nothing in this document should be considered rendering legal advice. On this subject, the laws are changing on a **daily basis**, and there is need to contact legal counsel for specifics.

As employers currently reel from the coronavirus pandemic, the **Lanier Ford COVID-19 Task Force** stands ready to help employers respond in practical and legal ways. Indeed, Lanier Ford's employment lawyers have already provided guidance to multiple employers to assist them in responding to this unprecedented event.

As a full-service law firm, Lanier Ford is ready and able to assist with any legal needs our clients may have during this unprecedented time. If we can be of any assistance to you, please do not hesitate to contact us. The members of our COVID-19 Task Force are the following:

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To help you keep up with the latest developments, our employment and business lawyers are posting to the firm's blog:

www.ThirdShiftBlog.com

In addition, we have prepared this summary of developments to help as well. It addresses the following topics:

- Requirements of the Families First Coronavirus Response Act. This act became law on March 18, 2020, and can be subdivided into two components: (1) the Emergency Paid Sick Leave Act and (2) the Emergency Family Medical Leave Expansion Act.
- COVID-19 and the ADA.
- COVID-19 and workers' compensation.
- OSHA safety guidance.

Families First Coronavirus Response Act

On March 18, 2020, Congress passed and President Trump signed the Families First Coronavirus Response Act (Families First Act). This act expands the Family Medical Leave Act (FMLA) to a new group of employees and employers. It also provides for paid leave for those who are experiencing coronavirus symptoms, diagnosed

with the illness, or caring for certain individuals who are affected. Importantly, sections of the new law require employers provide paid sick leave to care for a child if the child's school or daycare is closed due to COVID-19. These financial outlays are to be reimbursed to the employer through a series of tax credits. The Senate passed the House version of the bill without making any amendments. You can download a copy of the act here:

https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf

On March 24, 2020, the U.S. Department of Labor issued its preliminary guidance about the Families First Act.

https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave

In broad summary, the law provides two different types of paid leave to certain employees experiencing a need to care for themselves or others. These two different entitlements are broken down into two separate laws within the act: (1) the Emergency Paid Sick Leave Act (Sick Leave Act) and (2) the Emergency Family Medical Leave Expansion Act (FMLA Expansion Act).

Both of these laws provide for some measure of paid leave, with money fronted by the employer and later reimbursed to the employer through payroll tax credits. The economic impact on covered employers could be substantial.

Emergency Paid Sick Leave Act

The Sick Leave Act requires **all governmental employers**[1] in America and **all private employers** with fewer than 500 employees to provide 80 hours of paid sick time for full-time employees (or, for part-time employees, an amount equivalent to their average hours over 2 weeks) under certain defined circumstances. The triggers for paid leave are listed in Section 5102(a) of the law, as follows:

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 healthcare 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 paragraph 1 or has been advised as described in paragraph 2.

[1] Governmental employers include the U.S. Government, state governments, political subdivisions of state governments, which include both county governments and municipal governments.

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 childcare 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.

The Sick Leave Act is the easiest to understand, though it's a whopper in and of itself. It includes exceptions under which employees who are able to telework are **ineligible** for the paid sick leave. This will comfort many employers who have struggled mightily over the past few weeks to achieve telework solutions for their employees. Those employers can rest assured that if their employees are teleworking (and presumably not themselves overcome with the virus in a way that would prevent telework), the law's paid sick leave provision should **not** apply.

One big proviso: The law provides that an employer of any employee who is a "healthcare provider" may elect to exclude such employee and not provide the paid sick leave to such an employee. The term "healthcare provider" appears to be undefined, however, meaning we will have to await regulations before we understand precisely how far this carve-out goes.

On top of this, the Secretary of Labor has the authority under the Sick Leave Act to issue regulations "for good cause" to (a) exclude certain healthcare providers and emergency responders from the list of those employees eligible for leave, including by potentially allowing certain employers to opt out and (b) to exempt small businesses with fewer than 50 employees where the imposition of these requirements would jeopardize the viability of the business. Just how any such authority could be used remains uncertain at this time.

Divining exactly how much employers are to pay affected workers is painstaking. There is a general rule, but it is subject to several caps and exceptions. The general rule is that employees are entitled to be paid at their "regular rate" as defined by the Fair Labor Standards Act (FLSA) (i.e., their hourly rate or its equivalent for salaried workers) for the duration of the leave. (There are special procedures in the act for calculating the appropriate compensation for part-time employees with irregular schedules.) However, this "regular rate" general rule is subject to multiple different and highly important clarifications:

- First, the act provides that the paid sick leave shall "in no event" exceed $511 per day—i.e., $5,110 in the aggregate—for a use described in paragraph 1, 2, or 3 of section 5102(a). Section 5102 is the lengthy section quoted above which describes the various triggers for receiving pay. The reference to the first three sections means that the full amount of the potential compensation is only available for individuals who are—

- Subject to a quarantine or isolation order.
- Advised by a healthcare provider to self-quarantine.
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis.

- For the remainder of workers who are potentially eligible for paid sick leave under the Sick Leave Act, the total compensation available is not to exceed $200 per day, or $2,000 in the aggregate. Eligible employees are those covered by a circumstance identified in paragraph 4, 5, or 6 of section 5102(a). In other words, those eligible for the $200 maximum are those who are—
  - Caring for an individual who is subject to a quarantine or isolation order.
  - Caring for a child whose school or place of care has been closed or whose provider is unavailable due to precautions.
  - 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."

  We do not know at this time just what those "substantially similar conditions" might be, but regulations are coming within the next 15 days.

- Further, where an employee's required compensation is to be used to care for family members under Section 5102(a), not only is it capped at $200 a day ($2,000 in the aggregate), but the compensation is also limited to no greater than two-thirds of the employee's regular rate, computed as set out above.

Lanier Ford Covid-19 Task Force member Lauren Smith has detailed examination of possible changes that may come to these provision of the act as a result of the legislation the U.S. Senate may pass on March 25, 2020.

https://www.thirdshiftblog.com/entry/how-the-cares-act-could-change-the-families-first-act

So in summary, those who are directly affected by a health concern or quarantine related to the virus are eligible to earn their regular rate of up to $500 a day for 2 weeks. Those who are more indirectly affected, such as parents who lose their child care, are eligible to earn their regular rate of up to $200 a day ($2,000 in the aggregate), subject to a general proviso that their compensation should never exceed two-thirds of their regular rate.

Employers should be forewarned that this law has teeth. The law provides that it shall be a violation of the FLSA (which provides for doubling of damages and attorneys' fees) to "discharge, discipline, or in any manner discriminate" against any employee who takes leave under the act or engages in any protected activity (defined

in the traditional sense of filing a complaint, instituting a proceeding, or cooperating in an investigation under the act).

In terms of how the leave is to be taken and when, the law has a sunset provision of December 31, 2020. Therefore, any leave must be taken this year. Beyond that, it appears to be the employee's choice, or at least there is nothing in the law providing the employer any discretion or ability to schedule leave to minimize disruptions. In fact, the law provides that the employer "may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time." In other words, an employer cannot require exhaustion of accrued paid leave. Employees are entitled to immediately take the available sick pay leave and may then use any accrued leave if they desire.

The entire intent of the law appears to permit employees to take their leave when they need it, provided the relevant triggers are met, with no barrier to taking of that leave. Of course, the law does provide that none of its mandates shall be interpreted to require financial or other reimbursement to employees who simply fail to take the leave allotted to them.

Emergency FMLA Expansion Act

On top of the foregoing requirement of paid leave for 2 weeks, the Families First Act temporarily amends and, for that period, significantly expands, the federal Family Medical Leave Act of 1993. The temporary amendment to the FMLA will provide an additional period of paid and unpaid leave for affected employees, over and above what is provided by the Sick Leave Act. This is the component of the law referred to as the FMLA Expansion Act. This law will also expire on December 31, 2020.

Small employers must pay attention to this law. Until its expiration date, the expanded FMLA will be far more robust than in the past. First and foremost, the law now applies to all government employers and all private employers with fewer than 500 employees (whereas previously, it exempted all employers with less than 50 employees within 75 miles of a worksite). In addition, the traditional FMLA rule under which employees are not eligible for leave until they have completed 12 months of service with their employer—in essence, a waiting period—is suspended. The FMLA provisions now cover all employees who have worked for covered employers for just 30 days.

Carve-out for small businesses

The new law does contain a carve-out under which the Secretary of Labor will have the regulatory authority to exempt "small businesses with fewer than 50 employees" from the requirements of the law, but only where "imposition of such requirements would jeopardize the viability of the business as a going concern." The law sets no standard for that determination, so we will have to await regulatory clarification—and it is possible affected businesses may have to apply for relief.

Limited reinstatement requirements

However, even without awaiting regulatory guidance, the law does soften the blow for certain very small employers by providing that if an employer has fewer than 25 employees, it still must provide leave but its restoration requirements are limited. Under this provision, if an employee of a very small employer takes the leave but the employee's job is then eliminated due to the coronavirus emergency, the employer will be off the hook for any reinstatement so long as they continue to reach out to the employee for a defined one-year period if any equivalent position becomes available.

With these introductory matters out of the way, what the law says about the leave entitlement is actually fairly simple. The law amends section 102 of the existing FMLA (which already provides leave entitlements for the birth of a child, a serious health condition of the employee or a close family member, etc.) to tack on an additional leave category.

That additional leave category is entitled "qualifying need related to a public health emergency." The provision states that this term "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 childcare provider of such son or daughter is unavailable, due to a public health emergency." In turn, the term "public health emergency" simply means "an emergency with respect to COVID-19 declared by a Federal, State, or local authority."

New category of FMLA leave apparently available to parents only

If we are correctly reading Congress's intention, the only new category of leave available under the law is for parents who are affected by a school closure or loss of childcare and who are unable to telework. Apparently, being subject to a mandatory quarantine or isolation order or suffering from COVID-19 itself is not going to be sufficient to trigger FMLA leave under this new law, which means employers will simply have to decide whether an employee in such a situation would otherwise qualify for leave under the original FMLA. Our guess is that an employee who complains of significant COVID-19 symptoms would be regarded as suffering from a serious health condition as defined by the original FMLA, though this would be case by case. An employee merely subject to an isolation order or quarantine may not necessarily qualify for leave under Section 102 of the FMLA, though their job may be protected as a matter of public policy—a complex question that employers should carefully explore if the situation arises.

Returning to the FMLA Expansion Act, for those parents who do qualify for the leave, the potential leave period is the same as the FMLA—up to 12 weeks. Of that 12 weeks, the initial 10 days of leave for the above reasons will be unpaid. (Note that the 10-day elimination period does not extend the total 12 weeks of available leave; it merely distinguishes those first 10 days from the remainder of any leave). During this

10-day period of unpaid leave, employees are permitted to use any accrued leave if they have it and wish to use it, but the law does not seem to permit employers to force this choice. Many employees may choose against using up that accrued leave, because the law appears to permit them to use their 80 hours of paid leave under the Sick Leave Act during that time period.

Following the first 10 days of leave, the new law provides that the employer must provide paid leave "for each day of leave . . . that an employee takes," up to the existing statutory maximum of 12 weeks. However, the law clarifies that the employee's paid leave can only be "two-thirds of an employee's regular rate of pay" for the number of hours the employee would otherwise work (for salaried employees, presumably 40 hours a week). Even this two-thirds number is actually subject to a cap. The statute provides that "in no event shall such paid leave exceed $200 per day and $10,000 in the aggregate."

So in summary, the FMLA Expansion Act is of fairly limited scope. It will apply to parents only, and as to such parents, it will provide for a partial wage replacement of no more than two-thirds salary after a 10-day elimination period, subject then to daily and aggregate caps, all to be reimbursed to the employer later through the tax credits discussed below.

As with the Sick Pay Act, the Secretary of Labor is given the express authority to "exclude certain healthcare providers and emergency responders from the definition of eligible employee." We will have to await any action from the Secretary on that score.

Violations of the FMLA Expansion Act will be enforceable in the same manner as the original FMLA—enforcement actions by the Department of Labor and private lawsuits for back pay and attorneys' fees. In addition to mandatory leave provisions, the FMLA contains anti-interference and anti-retaliation provisions that employers should bear in mind.

Tax credits for certain employers and individuals

The Families First Act will reimburse **private employers** for the above-described paid leave entitlements (both under the Sick Leave Act and under the FMLA Expansion Act) through a quarterly tax credit to employers.[2] Because the reimbursement is a tax credit, the reimbursement will not be immediate. But because the credit comes in the form of a Social Security payroll tax credit, employers will see the benefit of it in upcoming paychecks (through reduced payroll taxes) and will not have to wait until

[2] More information is available here: https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus

next year. Regardless, an initial financial outlay by small businesses appears likely as a result of this law.

The news is worse for **government employers.** The act specifically states that Federal, State, and local governments and agencies are not entitled to the tax credit, meaning there is no anticipated reimbursement for the mandated wages.

However, there is some good news for those who are self-employed. The tax credit portion of the law (Sections 7002 and 7004) provides that in the case of an eligible self-employed individual, a tax credit is available in an amount equal to the qualified sick-leave entitlement and qualified FMLA sick-leave entitlement of the individual, to the same extent as if the person worked for a covered employer.

Summary and Effective Date

The big takeaway from this huge piece of legislation is that between the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act, many if not most employees in America will be entitled to 80 hours of paid leave, and some parents will receive additional allotment of up approximately 10 weeks of additional partially paid leave (at two-thirds of regular wages).

We expect additional relief is coming to businesses and public employers over the coming days, and also expect Congress will approve the concept of direct payments to individuals as well. Because there is no reason to expect that any subsequent enactments will delete or take away any of the provisions of the Families First Act, employers should begin planning. The law goes into effect on April 1.[3]

Following the effective date, the Secretary of Labor has 15 days to provide regulations and to prescribe a required notice that all covered employers must post in their workplaces. We will keep an eye out for any regulations and required posters,[4] which employers will need to post immediately.

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[3] Additional information is available here:
https://www.thirdshiftblog.com/entry/dol-announces-april-1-2020-as-effective-date-for-families-first-act

[4] DOL has issued a required poster for the Families First Act. In addition, DOL has published a list of frequently asked questions that indicates that the posting requirement can be met by emailing teleworking employees a copy of the poster.

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf?fbclid=IwAR0nX_Toqi5kYuosFmatOmwtJ_mzKBUBOULMNtQdgKO61-2M_AprWEsxvsk

https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions

COVID-19 and the ADA

The Americans with Disabilities Act (ADA) is another federal law that employers with more than 15 employees need to be considering during this time. Generally, the ADA prohibits medical examinations and inquiries under typical or standard conditions. Those general guidelines give way during a pandemic when the safety of all employees may be at issue.

Permitted inquiries during pandemic

Under pandemic conditions, an employer is permitted to inquire into an employee's health if he or she is experiencing flu-like symptoms (for example, fever or respiratory difficulties). Other, more pointed questions about disabilities or underlying risk factors or taking employees' temperatures may be permitted if the pandemic reaches the level of becoming a "direct threat" to other employees. Although we have likely reached a "direct threat" level with COVID-19, for most employers, a more conservative approach is to only inquire about an employee's symptoms and require any sick employees to stay home until they can provide a clear medical certification before returning to work.

If employee needs a reasonable accommodation . . .

If employers learn that an employee needs a reasonable accommodation (like telework or time off) due to a disability, the employer is obligated to engage in a dialogue (known as the "interactive process") no differently than a request made during another time. For example, if an employee with a compromised immune system would be at a higher risk of fatality if he or she contracted COVID-19, the employer is under an obligation to determine whether providing that employee with teleworking opportunities, time off, or something else would be a reasonable accommodation.

Time off may be a reasonable accommodation

The most important thing is to communicate with the employee (preferably in writing) to determine what the concerns are and what the employee is requesting. The employer then needs to determine what accommodations will allow the employee to continue performing the essential functions of his or her job. With the passage of the Families First Act, eligible employers should consider time off as a reasonable accommodation.

Keep medical information confidential

As always, any medical information the employer gets from employees must be kept confidential and maintained separately from each employee's regular personnel file.

See pandemic guidance from the Equal Employment Opportunity Commission (EEOC) at—

https://www.eeoc.gov/facts/pandemic_flu.html

COVID-19 and Workers' Compensation

With the rapidly evolving business and community environment as a result of the COVID-19 pandemic, here is some basic guidance on how the pandemic could affect workers' compensation and how employers can respond.

Obviously, an employee with a claimed COVID-19 illness would be a matter of first impression to the Alabama courts; so it is currently unclear how the act would apply to such claims. However, it is our opinion that COVID-19 should be treated as any other illness as it relates to determining whether the illness is compensable. COVID-19 is a "disease," which should be considered no different from the flu. The act generally excludes coverage for "diseases." Alabama Code § 25-5-1 (9) (1975), in defining an injury, states that an "Injury . . . shall **not** include a disease in any form, except for an occupational disease or where it results naturally and unavoidably from the accident" (emphasis added).

Therefore, whether the illness would be compensable would depend greatly on the particular job the employee was performing when exposed and whether the employee has an existing work-related injury. For instance, if an injured worker's health is already compromised due to a work-related injury, or if the injured worker had to go to medical clinics for treatment of a work-related injury, there is a potential argument that the contraction of COVID-19 by the worker "resulted naturally and unavoidably from the [original work-related] accident."

Little information is known about COVID-19 to date, but more is learned about the illness each day and that is expected to continue. Therefore, it is extremely important that employers document thoroughly when there is a report of a work-related COVID-19 illness. For instance, when reporting a suspected COVID-19 claim, it would be good practice to—

- Mention COVID-19 in the description of the illness so that it is easily recognizable by the carrier and any other entity which would need to implement specific COVID-19 protocols.
- Determine whether the employee had any contact with a person known to be COVID-19 positive, and if so, document when, where, and how that contact occurred.
- Confirm the onset of symptoms and whether the illness has been confirmed with a positive COVID-19 test.

- Document whether the employee or any member of his or her immediate family has traveled to an area of high risk, and if so, whether or not that travel was work related.
- Determine whether any immediate family members are showing symptoms.
- Determine any other employees who have had close contact (within 6 feet per current CDC guidelines) with the employee.

Existing non-COVID-19 claims could potentially be affected by this pandemic as well. One practical effect on existing claims may be that injured workers are unable to complete approved workers' compensation medical treatment. Employers should work with their carriers to determine the options for telehealth to treat minor injuries, participation in virtual physical therapy, etc. Telehealth may also be the best option for employers to determine whether a workers' injury has resolved or whether the injured worker is capable of returning to work. "Return to work" in this scenario would relate only to the worker's injury and not whether the worker is actually able to return to work due to COVID-19 shut downs, etc.

Ultimately, this is an ever-evolving situation, so we recommend that employers consult with their insurance carriers or third-party administrators to determine how best to handle claims related to COVID-19. We will continue to update on pertinent information related to workers' compensation and the effect that this pandemic may have on our clients.

OSHA Safety Guidance

The Occupational Safety and Health Administration (OSHA) has published a useful booklet to help employers prepare their workplaces for COVID-19. Although guidance published in this booklet does not create any additional legal obligations for employers, it can potentially help to reduce absenteeism.

You can download a copy of "Guidance on Preparing Workplaces for COVID-19" here:

https://www.osha.gov/Publications/OSHA3990.pdf

Similar guidance can be obtained from the Centers for Disease Control and Prevention:

https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

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