TIC International Corporation
Benefit Administrators and Consultants

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CLIENT BULLETIN

President Signs Families First Coronavirus Response Act

On March 18, 2020, Congress passed and the President signed into law H.R. 6201, the *Families First Coronavirus Response Act* in light of the current coronavirus pandemic. See *Benefit News Briefs 2020-16* for more on the coronavirus and COVID-19 pandemic.

The law provides paid leave under the *Family and Medical Leave Act (FMLA)* in certain circumstances, paid sick leave, free coronavirus testing, expanded food assistance and unemployment benefits and additional protections for health care workers.

We will focus on the paid leave changes under the *FMLA*, paid sick leave and free coronavirus testing. Both the *FMLA* and paid sick leave changes apply to employers with less than 500 employees. Employers contributing to a multiemployer plan can satisfy the requirement to provide additional *FMLA* benefits and paid sick leave if their employees can obtain the equal benefit from the multiemployer plan to which the employer contributes for those employees.

The change requiring health plans to provide free testing for the coronavirus applies to all insured and self-funded health plans (grandfathered and non-grandfathered), including multiemployer health plans.

Changes Made to the FMLA

The new law *amends the FMLA* to allow employees to take up to twelve weeks of *FMLA* leave between the effective date of the law and December 31, 2020 because of a *qualifying need related to a public health emergency*. The term "qualifying need related to a public health emergency" means the employee is unable to work (or telework) due to a need to care of a son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

A "public health emergency" means an emergency with respect to COVID–19 declared by a Federal, State or local authority.

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Under the law, the first 10 days of this new *FMLA* leave is unpaid, as usual, but after 10 days the leave becomes paid leave. Ten days equals about two full workweeks. The leave must be at least two-thirds of an employee's regular rate of pay multiplied by the number of hours the employee would otherwise be normally scheduled to work, with a $200/day limit and an overall limit of $10,000. There are special rules for the case of an employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken the *FMLA* leave.

The new FMLA leave is only available to employees who have been employed for thirty days. The emergency paid sick leave discussed below does not have such a requirement, but is available immediately upon hire. As such, employees eligible for this newCOVID-19 related *FMLA* leave could fill in the unpaid ten days under the *FMLA* leave with the 80 hours (about two weeks) of paid sick leave under the *Emergency Paid Sick Leave Act*.

This new employee *FMLA* leave requirement applies to employers with "fewer than 500 employees", instead of the usual application to employers of "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."

FMLA Requirement and Multiemployer Plan Contributing Employers

Section 3103 of the law applies specifically to employers contributing under a multiemployer collective bargaining agreement (CBA). Such an employer may fulfill its obligations for providing this new *FMLA* leave by making contributions to a multiemployer fund or plan based on the paid leave each of its employees is entitled to while working under the CBA. Provided that the multiemployer fund or plan enables employees to be paid for such benefits based on hours they have worked under the CBA for paid leave taken under the new section of the *FMLA* added by the law.

Employees who work under this type of multiemployer CBA may obtain monies owed to them for lost wages under the new paid leave portion of their COVID-19-related *FMLA* leave from such plan based on hours the employee would have worked under the CBA for paid leave under the *FMLA* as now required by the new law. Multiemployer plans must decide whether to provide such extra coverage or to let the contributing employer cover the new requirements.

These *FMLA* changes are effective 15 days after enactment of the law, about April 2, 2020.

The New Emergency Paid Sick Leave Act

The new law also adds a paid sick time requirement requiring an employer to provide each employee with paid sick time to the extent that the employee is unable to work (or telework) due to:

(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 paragraph (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. Except that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.

However, the paid sick time shall not exceed:

- $511 per day and $5,110 total leave based on paragraph (1), (2), or (3) above; and
- $200 per day and $2,000 total for leave based on paragraph (4), (5), or (6) above.

A full-time employee shall be entitled to 80 hours of paid sick time. Part-time employees are entitled to an amount equal to the number of hours that such employee works, on average, over a 2-week period. The paid emergency sick time shall be available for immediate use by the employee regardless of how long the employee has been employed by an employer. Unlike *FMLA* leave which requires the employee be employed for 30 days before being entitled to *FMLA* leave, this paid sick leave is available immediately upon employment.

Emergency Paid Sick Leave and Multiemployer Plan Contributing Employers
Much like the new paid *FMLA* leave, Section 5106 of the law addresses employers contributing to a multiemployer plan. An employer signatory to a multiemployer CBA may fulfill its obligations under the law by making contributions to a plan based on the hours of paid sick time each of its employees is entitled to under the new law while working under the CBA. Provided, that the fund or plan enables employees to be paid based on hours they have worked under the CBA.

Employees who work under a multiemployer CBA into which their employers make contributions may secure pay from such plan based on hours they have worked under the CBA, if the multiemployer plan provides the benefit instead of letting each individual employer provide the emergency paid leave.

Multiemployer plans must decide whether to provide such extra coverage or to let the contributing employer cover the new emergency sick leave requirements.

These new emergency paid sick leave requirements take effect not later than 15 days after the date of enactment of the law, about April 2, 2020, and shall expire on December 31, 2020.

Coverage of Testing for COVID–19

The last item we will look at concerns requirements for group health plans and health insurance issuers offering group or individual health insurance coverage (including a grandfathered health plan) to provide coverage, and **not impose any cost sharing** (*including deductibles, copayments, and coinsurance*) requirements or prior authorization or other medical management requirements, for the following items and services furnished during any portion of the emergency period beginning on or after March 18, 2020 until the Secretary of Health and Human Services determines that the COVID-19 emergency has ended:

(1) In vitro diagnostic products for the detection of SARS–CoV–2 or the diagnosis of the virus that causes COVID–19 that are approved, cleared, or authorized under the appropriate sections of the Federal Food, Drug, and Cosmetic Act, and the administration of such in vitro diagnostic products.

(2) Items and services furnished to an individual during health care provider office visits (which includes in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product described above, but only to the extent such items and services relate to the furnishing or administration of such product or to the evaluation of such individual for purposes of determining the need of such individual for such product.

The law does not address whether such testing can be limited to “in-network” only or covers both in and out-of-network testing. Plans should anticipate that the “no cost-sharing” means testing will apply to both “in and out-of-network” claims unless guidance to the contrary is issued. That expectation seems safest given the short-term, emergency, remedial nature of the law. Several commenters have pointed out a similarity to the ACA coverage rules for emergency room, same cost-sharing from employee whether in or out-of-network.

A person needs a doctor’s order to undergo COVID-19 testing. The testing criteria is: being in close contact with someone with the coronavirus; living in a community where the disease is spreading; and the person has COVID-19 symptoms.

Other sections of the law make similar testing requirements on Medicare, Medicare Advantage plans, Medicaid and CHIP, Tricare, and Indian Health Service.

Action Items

Trustees and their plan professionals will need to review current benefits provided by the plan for extended periods of sickness to determine if the plan should cover the additional paid *FMLA* requirement and emergency paid sick leave requirements or require the contributing employer to cover the new costs.

Multiemployer health plan administrators will need to work with their plan professionals to ensure compliance with the new COVID-19 "no cost-sharing" testing requirements. The requirement applies to in-person and telehealth "visits" with a health care provider. The law does not require a health plan to offer telehealth visits, but if an individual uses a provider's telehealth option, this should be covered at no cost-sharing.

We would anticipate that FAQs and other subregulatory guidance will be issued soon, given the short-term nature of these changes in the law which expire December 31, 2020.

We will continue report on guidance as it is issued.

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