

## Coronavirus: Important Employment-Related Developments at Federal and Local Levels

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### PRACTICE AREAS

- Labor & Employment

### **An McV Labor & Employment Law Alert**

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As the coronavirus (COVID-19) pandemic emergency continues to unfold, both federal and local governments have moved to take measures to control this major outbreak from getting worse. Many of these measures have had a direct impact on employers, putting major strains on all kinds of businesses.

We have been closely monitoring all these minute-by-minute developments in order to provide you with a more comprehensive and complete overview.

This Alert covers and summarizes for you the most important employment-related developments at federal and local levels that employers need to know as of today.

### **Federal Sick Leave and Emergency FMLA Leave**

On March 18, 2020, President Donald J. Trump signed the Families First Coronavirus Response Act ("FFCRA"), a comprehensive emergency law that provides relief and benefits to individuals and families affected by the Coronavirus pandemic emergency, including paid leaves for certain workers.

Of relevance to employers, the FFCRA requires public agencies and private employers with less than 500 employees to provide their employees with paid sick and paid family and medical leave if they are impacted by the Coronavirus health emergency, subject to the provisions outlined below. However, employees who are healthcare providers and emergency responders may be excluded from these benefits.

Employers who grant paid leave to employees under the FFCRA will receive IRS refundable tax credits on the wages paid. However, it is not clear if and how these tax credits will be made available to Puerto Rico employers.

In addition, the law allows the U.S. Secretary of Labor to publish regulations to exempt small businesses with fewer than 50 employees from providing the paid sick leave and FMLA emergency leave if it affects the viability of their business.

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These paid sick and paid family and medical leave benefits will become effective on April 2, 2020 and expire on December 31, 2020.

### ■ **Emergency Paid Sick Leave Act**

Under the FFCRA, employers must provide a paid sick leave to an employee who is unable to work or telework, regardless of length of employment with the employer, for any the following reasons:

- to self-isolate due to a diagnosis of COVID-19, or if a health care provider or government authority orders the employee to quarantine.
- to self-isolate and seek a diagnosis due to symptoms of COVID19, or because the employee experiences any substantially similar condition specified by the Secretary of Health.
- to care for an individual who is subject to a quarantine order from the government or a health care provider due to the COVID-19 public health emergency.
- to care for a son or daughter of the employee if the school or childcare has been closed, or the childcare provider is unavailable due to COVID-19 public health emergency circumstances.

Payment of this emergency sick leave to full time employees is 2 weeks (10 days) or 80 hours at the employees' regular rate of pay. Part time employees must be paid their usual 2 weeks (10 days) of pay or an average amount. Payment is limited to \$511 per day and \$5,110 in the aggregate if the leave is for the employee's own care. On the other hand, if the leave is to care for a family member or a child out of school or childcare, the payment is 2/3 of the employee's regular rate of pay, which is capped at \$200 per day and \$2,000 in the aggregate.

Employers must allow the employee to first use the paid sick leave provided under this law, and then the employee may decide to use any accrued paid leave under local law or under the employer's policy. An employer may not require the employee to use other paid leave before use of this emergency paid sick leave.

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Employees who work under multi-employer collective bargaining agreements and whose employers pay into a multi-employer plan are also entitled to this paid sick leave.

Failure to pay emergency sick leave is deemed a violation of the Fair Labor Standards Act and it will subject the employer to payment of owed salaries, liquidated damages and criminal penalties, if the violation is willful.

### ■ **Emergency Family and Medical Leave Expansion Act**

The FFCRA also amends the Family and Medical Leave Act of 1993 (FMLA) to require employers to allow the use of up to 12 weeks of FMLA emergency leave to any employee who has a “qualifying need” due to the COVID-19 public health emergency declared by the government and who has worked for the employer at least 30 calendar days.

The “qualifying need” is limited to circumstances where an employee is unable to work or telework due to a need for leave to care for a minor child (under 18 years of age), if the child’s school or place of care has been closed or the childcare provider is unavailable due to the COVID-19 public health emergency.

The initial 10 days of the FMLA emergency leave related to the COVID-19 public health emergency are unpaid. However, an employee may elect to substitute any accrued paid leave (e.g. vacation or sick leave) to cover this initial period. It is unclear whether an employer can require the employee to substitute accrued paid leave during the 10-day period. After the initial 10 days of FMLA emergency leave, the employer must pay the employee no less than 2/3 the employee’s regular pay for up to 12 weeks total. Payment is limited to \$200 per day and \$10,000 total in the aggregate.

Employers must restore the employee to the same or equivalent position upon conclusion of the FMLA emergency leave. However, employers with 25 or less employees may be exempted from the job restoration requirement if the position no longer exists due to economic reasons related to the Coronavirus emergency. Such employers must make reasonable efforts to restore the employee if an equivalent position becomes available within one year of the employee’s use of FMLA emergency leave.

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### **The Puerto Rico Government's Response to the Coronavirus**

#### ■ ***Puerto Rico Governor's Executive Orders 2020-020 and 2020-023***

On March 12, 2020, the Governor of Puerto Rico issued Executive Order 2020-020 declaring a state of emergency in response to the pandemic flu. A couple of days later, in an attempt to curb the transmission of the pandemic flu, Executive Order 2020-023 was issued to implement island-wide lock down and quarantine measures, including a curfew (from 9:00 p.m. to 5:00 a.m.) and the closing of government offices and most of the private sector. You can **access our summary of Executive Order 2020-023 here.**

#### ■ ***Puerto Rico Department of Labor Opinion 2020-01 to Provide Guidance on COVID-19***

Prior to Executive Order 2020-023 (imposing the lock down and quarantine measures), the Puerto Rico Department of Labor and Human Resources' Secretary had issued Opinion No. 2020-01 to clarify the applicable statutes, and to generally discuss measures that employers may adopt during this state of emergency. The Puerto Rico Department of Labor has yet to issue additional guidance after the Executive Order 2020-023 was issued, which creates uncertainty given the infinite challenges that employers face with the new strict quarantine measures. It is expected that another Opinion Letter will be issued soon to address this gap.

Opinion No. 2020-01 reaffirms that employers have a duty to maintain a safe and healthy workplace, which is rooted in the Commonwealth's Constitution and regulated by both local and federal law. Accordingly, the Opinion directs employers to implement best practices to stop the spread of the coronavirus in the workplace and to prepare a plan to implement health and safety measures. Employers are encouraged to allow employees to work remotely and it addresses local laws that allow employees to request changes in their work schedule and location. Lastly, the Opinion advises employers to comply with antidiscrimination and antiretaliation statutes in their application of protocols and employment practices related to this health emergency.

#### ■ ***The Puerto Rico Legislative Branch's Response to COVID-19***

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In response to the state of emergency decreed by the Governor of Puerto Rico, the Puerto Rico House of Representatives introduced House Bill 2428 (HB 2428) to amend Puerto Rico's Minimum Wage, Vacation and Sick Leave Act, to establish a special leave for non-exempt employees with a suspected or actual diagnosis of a pandemic illness. On March 16, 2020, the Senate approved HB 2428, but made significant changes to the original measure. As currently drafted, HB 2428 provides a special paid leave of five (5) days during a public health emergency to certain private sector employees who are suffering or suspect they are suffering the health condition that provoked the state of emergency declared by the Governor or the Secretary or the Department of Health. If enacted, eligible employees must first exhaust any accrued leaves. HB 2428 must now go back to the House of Representatives for concurrence.

It is worth noting that yesterday, the House of Representatives rejected a competing comprehensive bill introduced by the Senate (SB 1538), which had caused great concern within the private business sector, because it would have required employers who chose to suspend their operations due to the state of emergency to continue to pay their employees' salary indefinitely.

We are closely monitoring the progress of legislation and we will keep you promptly informed of any developments.

### ■ ***Puerto Rico State Insurance Fund Eases Coverage Requirements***

On March 18, 2020, the Puerto Rico State Insurance Fund Corporation (SIF) announced that it has adopted several measures to benefit employers during the state of emergency. Among these, the SIF is extending the coverage period for all workers' compensation policies that expire between March and April 30, 2020. Also, employers will not have to immediately amend their SIF policies to cover employees who are working remotely from their homes. The SIF informed that workers' compensation insurance coverage will be extended to employees who are working from home due to the pandemic health emergency, up until April 30, 2020 or up to ten (10) days after normal operations are established.

As Puerto Rico continues to manage this state of emergency, our L&E group is available to help you with any issues related to this crisis and to help you make informed decisions about your operating plans. We are currently working remotely and can be reached by email or by phone. Below you will find links to all our emails.



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