CRCA NEWS BULLETIN – COVID RELIEF LEGISLATION PASSED 12/27/20

The Families First Coronavirus Response Act (FFCRA) included two separate acts: (1) the Emergency Paid Sick Leave Act, and (2) the emergency Family and Medical Leave Expansion Act. As part of the COVID relief bill passed on December 27, 2020, compliance with the paid sick leave and paid family and medical leave provisions of the FFCRA is no longer mandatory. However, employers **may** extend FFCRA benefits through March 31, 2021. Those employers who choose to extend FFCRA benefits will be eligible for dollar-for-dollar payroll tax credits similar to those in the original FFCRA.

Aside from a few minor changes (as further outlined below), in order for an employer to reap the tax benefits of the FFCRA Extension, it must comply with the terms of the original FFCRA (the actual wording of the Dec. 27 bill states that employers receive tax credits for providing paid leave "as would be so required to be paid if [the FFCRA] were applied."). All qualifying reasons for taking leave, limitations on the amount of leave for which an employee is eligible, and documentation requirements will remain the same for employers who choose to participate in the FFCRA Extension.

Emergency Paid Sick Leave - Employers receive a tax credit under the FFCRA Extension for all amounts paid to employees taking paid sick leave for a qualifying reason under the original FFCRA through March 31, 2021. The 80-hour limitation remains the same. In other words, the Dec. 27 bill does not increase the 80-hours of paid leave limitation under the original Emergency Paid Sick Leave Act -- it simply extends an eligible employee's deadline to use those paid leave hours from Dec. 31, 2020 to March 31, 2021 (assuming the employer voluntarily chooses to participate in the extension).

Emergency (paid) Family and Medical Leave - Employers can receive a tax credit under the FFCRA Extension for all amounts paid to employees taking family medical leave for a qualifying reason under the original FFCRA through March 31, 2021. Understanding the Dec. 27 bill's extension of the Family Medical Leave Extension Act ("extended FMLA"), requires an understanding of (a) the preexisting, normal FMLA, (b) the FFCRA's original extended FMLA (that went into effect in April 2020), and (c) the bill's extension of the FFCRA's original extended FMLA.

In simple terms:

1. **Pre-existing, normal FMLA**. The normal, existing FMLA (before COVID and the FFCRA) already provided eligible employees with up to 12 weeks of ***unpaid*** leave for qualifying medical/family reasons. This 12-week limitation was based on the employer's 12-month calendar period (e.g., employers can determine that their FMLA calendar year runs from Jan. 1 to Dec. 31, or from July 1 to June 30).
2. **Original FFCRA**. The FFCRA, which went into effect in April 2020, extended the existing FMLA to include ***paid*** leave for employees who require leave to care for a child whose school or childcare is unavailable because of COVID-19. The FFCRA added a new basis for leave to the existing FMLA -- i.e., where employees need to care for a child whose school or childcare is unavailable because of COVID-19 -- and made it so an employee taking leave for this new reason would be entitled to receive paid leave (at two-thirds of the employee's regular pay). An employee taking leave for the new reason of caring for a child whose school/childcare is unavailable was still limited to the 12-week maximum of the original FMLA. And, such an employee's first 2 weeks of extended FMLA leave would be unpaid (like all leave under the normal, preexisting FMLA), but after those initial two weeks the employee's leave would be paid for the remaining 10 weeks of FMLA leave. In sum, the FFCRA basically just added one extra reason for FMLA leave and made leave for just that single new reason paid leave; employees

are still limited to the FMLA's limitation of 12 weeks of leave per 12-month calendar period. So, if an employee used up 6 weeks of normal FMLA leave, they would only have 6 weeks of FMLA leave left for the FFCRA's extended FMLA leave.

3. **Extended FFCRA.** The original FFCRA's extension of the FMLA was set to expire on Dec. 31, 2020. The Dec. 27 bill extends the FFCRA three months (to March 31, 2021) for employers who voluntarily choose to utilize the extended FFCRA. So, if an employee chooses to participate in the extended FFCRA, then their employees can use extended FMLA leave for the first three months of 2021. However, the FMLA's limitation of 12 weeks of leave per the employer's 12-month calendar still applies to the extended FFCRA -- so, if an employer chooses to participate in the extended FFCRA (through March 31) that does not necessarily mean their employees get another 12 weeks of extended FMLA leave (that would only be true if the employer's normal FMLA calendar restarts on Jan 1, 2021).

The main, succinct takeaways are that the 3 months of extended FFCRA leave are ***optional*** for private employers; for employers who choose to participate in the extended FFCRA, the standard and requirements for utilizing the corresponding tax credit remain the same; and the 3-month extension of the FFCRA does not grant employees more leave, but simply extends their deadline to use their FFCRA leave (from Dec. 31, 2020 to March 31, 2021).

(CRCA appreciates the information provided by Benjamin Briggs, Partner with Cotney Construction Law. CRCA Member Cotney Construction Law was appointed CRCA's General Counsel in December, 2020.)