CLIENT ALERT: U.S. Department of Labor Updates Q&A on the Families First Coronavirus Response Act

Last week, we published a client alert on the United States Department of Labor's ("DOL") questions and answers to assist in the implementation of the new Emergency Paid Sick Leave Act and Emergency Family Medical Leave Expansion Act included within the Families First Coronavirus Response Act ("FFCRA"). As noted in our initial alert, these laws generally apply to private-sector employers with fewer than 500 employees and covered public-sector employers. The DOL has since updated its Q&A, offering the following additional guidance on the new law:

(1) Recordkeeping/Documentation. Private sector employers that provide Emergency Paid Sick Leave and/or Emergency Family and Medical Leave are eligible for reimbursement of costs of that leave through refundable tax credits. If an employer intends to claim a tax credit to recover the pay provided to employees on these emergency paid leaves, it should retain documentation for its records, and consult Internal Revenue Service (IRS) applicable forms, instructions, and information for procedures that must be followed to claim the tax credit, including any needed substantiation to be retained in support of the credit. Notably, *employers are not required to provide an employee leave if materials sufficient to support the applicable tax credit have not been provided.*

If an employee takes Emergency Paid Sick Leave or Emergency Family and Medical Leave, employers may require the employee to provide them with any additional documentation in support of such leave, to the extent permitted under the certification rules for the conventional FMLA leave requests. This may include a) a notice that has been posted on a government, school, or day care website, or published in a newspaper; or b) an e-mail from an employee or official of the school, place of care, or child care provider.

If an employee is taking leave for one of the existing qualifying reasons under the Family and Medical Leave Act of 1993 ("FMLA"), all existing certification requirements under the FMLA remain in effect, including the medical certifications, if required by the employer.

(2) Employees taking Emergency Family and Medical Leave and Teleworking employees taking Emergency Paid Sick Leave may take leave intermittently, if the employer agrees. For example, if an employee is unable to work his or her full schedule and is taking Emergency Family and Medical Leave or is teleworking and taking Emergency Paid Sick Leave, the employee and employer can agree that the employee will receive paid leave for the hours they are unable to work. Intermittent leave can be taken in any increment for this purpose – thus, an agreement could be that an employee works Monday, Wednesday, and Friday, and receives paid leave for Tuesday and Thursday; or an employee works 9am – 1pm Monday through Friday, and receives paid leave for 1pm – 5pm, or any other agreed upon variation. Most importantly, employees are not entitled to take

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Emergency Paid Sick Leave or Emergency Family and Medical Leave intermittently as a matter of right; it is the employer's decision as to whether it wishes to allow leave to be taken in this fashion.

(3) Employees working at their usual worksite may take intermittent Emergency Paid Sick Leave *only* if it is to care for the employee's child whose school or place of care is closed or child care provider is unavailable, and only if the employer agrees. Once again, employees are not entitled to take Emergency Paid Sick Leave or Emergency Family and Medical Leave intermittently as a matter of right; it is the employer's decision as to whether it wishes to allow leave to be taken in this fashion.

The Q&A anticipates that workers using Emergency Paid Sick Leave due to a child's school or daycare closure or child-care provider unavailability will take such leave in full day increments. The DOL, however, encourages employees and employers to "collaborate" on these issues and does not preclude an agreement that provides for the leave to be taken in less than full-day increments.

Once an employee (other than a teleworker) begins taking Emergency Paid Sick Leave for any qualifying reason other than the school/daycare closure, the employee must continue to take paid sick leave each day until they either a) exhaust the Emergency Paid Sick Leave; or b) no longer have a qualifying reason for taking Emergency Paid Sick Leave. The DOL explains that this limit is imposed to reduce the risk of spreading the virus to others.

If the employee no longer has a qualifying reason for taking Emergency Paid Sick leave before it is exhausted, they may take remaining paid sick leave at a later time, until December 31, 2020, if a qualifying reason occurs.

(4) If the employer closes the worksite, employees are not eligible for Emergency Paid Sick Leave or Emergency Family and Medical Leave during the period of the closure, whether the closure is for lack of business or required by a Federal, State, or local directive. If the employer closes the worksite (*i.e.,* sends employees home, not merely remote working, and stops paying them) prior to April 1, 2020 (the FFCRA's effective date), employees are not entitled to Emergency Paid Sick Leave or Emergency Family and Medical Leave during the period of the closure. If the employer closes the worksite after April 1, 2020, employees are not eligible for Emergency Paid Sick Leave or Emergency Family and Medical Leave beginning on the date of the closure. This is true even if an employee requested leave prior to the date of the closure. Employees who are on leave prior to the closure are entitled to Emergency Paid Sick Leave and Emergency Family and Medical Leave only for the qualifying period prior to the closure. If the worksite reopens and the employee resumes work, the employee would then be eligible for Emergency Paid Sick Leave or Emergency Family and Medical Leave for qualifying reasons until its expiration on December 31, 2020.

Employees whose worksite is closed may be eligible for unemployment insurance benefits (including potential enhanced unemployment benefits), but should know that the receipt of any accrued vacation, personal, sick, or medical leave may impact their eligibility for such benefits.

(5) If the employer is open, but the employee has been furloughed on or after April 1,

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2020, the employee is not eligible for Emergency Paid Sick Leave or Emergency Family and Medical Leave during the period of the furlough. Furloughed employees may be eligible for unemployment benefits, as above.

(6) Likewise, if an employee's scheduled work hours are reduced because the employer does not have work for the employee to perform, the employee may not use Emergency Paid Sick Leave or Emergency Family and Medical Leave for the hours he or she is no longer scheduled to work. However, employees may take Emergency Paid Sick Leave or Emergency Family and Medical Leave if a COVID-19 qualifying reason prevents the employee from working his or her full schedule (as opposed to the employer reducing hours for lack of work). In this instance, the amount of leave the employee would be entitled is computed based upon their regular full-time schedule.

(7) Employees may not collect unemployment insurance benefits for the time in which they receive Emergency Paid Sick Leave and/or Emergency Family and Medical Leave. However, the DOL recently clarified additional flexibility to the States to extend partial unemployment benefits to workers whose hours or pay have been reduced. Employees can contact their State unemployment insurance office for specific questions about eligibility.

(8) Employees on Emergency Paid Sick Leave or Emergency Family and Medical Leave are entitled to continue group health coverage during the period of leave. Employees on Emergency Family and Medical Leave and Emergency Paid Sick Leave must be provided health coverage on the same terms as if the employee continued to work, so the employee must continue to make normal contributions toward the cost of coverage. This also means that the requirements for eligibility, including any requirement to complete a waiting period, would apply in the same way as if the employee continued to work.

If the employee does not return to work at the end of their Emergency Family and Medical Leave, they may no longer be eligible to keep the health coverage on the same terms, but may be able to continue coverage under the Consolidated Omnibus Budget Reconciliation Act ("COBRA").

(9) Employees may not use preexisting leave entitlements and FFCRA paid leave concurrently for the same hours. An employee may, however, be permitted to supplement the amount received in Emergency Paid Sick Leave or Emergency Family and Medical Leave with pre-existing employer-provided paid leave, up to the employee's normal earnings, with the employer's agreement. For example, if an employee is receiving 2/3 of his or her normal earnings from Emergency Paid Sick Leave or Emergency Family and Medical Leave, the employer may allow the employee to use pre-existing employer-provided paid leave to supplement the remaining 1/3 of the employee's pay. The employee and employer must agree to this arrangement; employers may not unilaterally decide to supplement an employee's pay and employees do not have an entitlement to supplement.

Employers may not claim, and will not receive a tax credit for supplemented amounts.

(10) Employers may not require employees to supplement or adjust the pay mandated

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under the FFCRA with paid leave that the employee may have under a paid leave policy. This differs from traditional FMLA, which allows employers to require the use of accrued vacation, personal, medical, or sick leave during the FMLA-qualifying leave. See also point 9 above.

(11) Employers may pay employees more than they are entitled to for Emergency Paid Sick Leave or Emergency Family and Medical Leave, but will not receive a tax credit for the amounts in excess of the FFCRA's statutory caps.

(12) Employers who are part of a multiemployer collective bargaining agreement ("CBA") may satisfy their obligations under the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act through contributions to a multiemployer fund, plan, or program. These contributions must be based on the amount of Emergency Paid Family and Medical Leave, or hours of Emergency Paid Sick Leave to which each of the employer's employees is entitled under the FFCRA based on each employee's work under the multiemployer CBA. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under the FFCRA. Alternatively, employers may choose to satisfy their obligations by other means, provided they are consistent with the employer's bargaining obligations and the CBA.

(13) For purposes of Emergency Paid Sick Leave and Emergency Family and Medical Leave, "employee" includes all U.S. (including Territorial) employees, full and part-time employees, and "joint employees" working on an employer's site temporarily and/or through a temp agency, and does not include independent contractors. The definition of "employee" mirrors the definition in the Fair Labor Standards Act ("FLSA"), that an employee "is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves." The United States Supreme Court has identified a number of factors relevant to distinguishing an employee from an independent contractor under the FLSA, including a) the extent to which the services rendered are an integral part of the principal's business; b) the permanency of the relationship; c) the amount of the alleged contractor's investment in facilities and equipment; d) the nature of degree and control by the principal; e) the alleged contractor's opportunities for profit and loss; f) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and g) the degree of independent business and organization.

As previously stated, employers of health care providers and/or emergency responders are not required to provide such employees Emergency Paid Sick Leave or Emergency Family and Medical Leave. Further, certain small businesses may exempt employees if the leave would jeopardize the company's viability as a going concern, as discussed in more detail below.

(14) For purposes of Emergency Paid Sick Leave and Emergency Family and Medical Leave "son or daughter" is the employee's own child, including the employee's biological, adopted, foster, or step child, a legal ward, or a child for whom the employee is standing in loco parentis – someone with day-to-day responsibilities to care for or financially

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support a child. **The definition also includes an adult son or daughter (18 years of age or older), wh**o: **a) has a mental or physical disability, and b) is incapable of self-care because of that disability.** This is consistent with traditional coverage under the FMLA.

(15) The Emergency Paid Sick Leave and Emergency Family and Medical Leave provisions of the FFCRA will be enforced by the Department of Labor's Wage and Hour Division ("WHD"), and while employees are directed to first try and resolve disputes directly with their employer, they may also call the WHD directly, file a complaint with the WHD, or, in most cases, file a lawsuit directly without contacting WHD. For alleged Emergency Family and Medical Leave violations, employees may only file a lawsuit if the employer employs 50 or more employees and/or is a "covered" employer under the Family and Medical Leave Act.

(16) Employees utilizing Emergency Paid Sick Leave and Emergency Family and Medical Leave are entitled to job restoration in the same manner as the FMLA, with the additional exception provided for employers with fewer than 25 employees, discussed here. Employers are required to provide the same (or an equivalent) job to an employee who returns to work following leave, but employees are not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether the employee took leave. This means employers can lay employees off for legitimate business reasons, such as the closure of the worksite, so long as the employer can demonstrate that the employee would have been laid off even if they had not taken leave. Employers may also refuse to return employees to work if they are a highly compensated "key" employee (a salaried, FMLA-eligible employee who is among the highest-paid 10% of all of the employer's employees within 75 miles), as set forth in the FMLA. To be clear, the exception for employers with fewer than 25 employees is *in addition to* the usual exceptions provided under traditional FMLA, *i.e.*, layoffs that would have affected the employee irrespective of their leave status.

(17) Employees eligible for both traditional FMLA and Emergency Family and Medical Leave are entitled to 12 weeks of leave total during the 12-month period. Thus, if an employee has already utilized some, or all of their 12-week allotment of FMLA leave for the year, their allowance for Emergency Family and Medical Leave should be adjusted, accordingly. For example, if an employee has already utilized 12 weeks of FMLA prior to April 1, 2020, the employee will not be eligible for any additional Emergency Family and Medical Leave under the new law. If an employee has utilized 6 weeks of FMLA prior to April 1, 2020, the employee will only be entitled to his/her remaining 6 weeks of Emergency Family and Medical Leave. Likewise, if an employee utilizes some, or all of their 12-weeks of FMLA as Emergency Family and Medical Leave, the balance of their traditional FMLA must be adjusted so they may or may not be eligible for traditional FMLA later in the benefit year. For example, an employee who utilizes 6 weeks of Emergency Family and Medical Leave will be entitled to 6 more weeks (12 weeks total) of traditional FMLA if a qualifying reason arises later in the 12-month period.

Eligible employees are entitled to Emergency Paid Sick Leave regardless of how much leave they have taken under the FMLA. Nonetheless, if an employee takes Emergency Paid Sick Leave

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concurrently with the first two weeks of Emergency Family and Medical Leave, which may otherwise be unpaid, those two weeks will count toward the employee's 12-week FMLA entitlement in the 12-month period.

(18) Employees may not use Emergency Paid Sick Leave and Emergency Family and Medical Leave together for any COVID-19 related reason. The two laws specifically proscribe the specific COVID-19 related reasons for which they may be used and how they may be used. Emergency Family and Medical Leave may only be used when an employee is on leave to care for their child whose school or place of care is closed, or whose childcare provider is unavailable due to COVID-19 related reasons. Emergency Paid Sick Leave may be used for this reason as well as numerous other reasons related to an employee's COVID-19 diagnosis, quarantine, or isolation, or to care for an individual who has been quarantined or isolated due to COVID-19.

(19) Under the Emergency Paid Sick Leave Act, "full-time" employees are employees who are normally scheduled to work *40 or more hours* per week, and "part-time" employees are employees normally scheduled to work *fewer than 40 hours* per week. Thus, for the purposes of calculating Emergency Sick Leave entitlements, only employees who are normally scheduled to work 40 or more hours are entitled to 80 hours of Emergency Paid Sick Leave. Employees normally scheduled to work fewer than 40 hours are entitled to Emergency Paid Sick Leave in an amount equal to the average number of hours they are normally scheduled to work in a two-week period. For further discussion of the hours calculation for part-time employees, see point (5) here.

(20) The Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive. As noted previously, after the first 10 days, the employee must be paid a benefit in the amount of not less than 2/3 of an employee's regular rate of pay, multiplied by the number of hours the employee would otherwise be normally scheduled to work (up to a cap of $200/day and $10,000 in the aggregate).

(21) Public sector employees are entitled to Emergency Paid Sick Leave if they work for a public agency or other unit of government. This includes the government of the United States, a State, the District of Columbia, a Territory or possession of the United States, a city, a municipality, a township, a county, a parish, or a similar government entity. However, the Office of Management and Budget ("OMB") has the authority to exclude some categories of U.S. Executive Branch employees from taking certain kinds of paid sick leave. Federal employees are encouraged to seek guidance from their employers as to their eligibility. Further, health care providers and emergency responders may be excluded from eligibility by their employers, as discussed in greater detail below.

(22) Public sector employees are entitled to Emergency Family and Medical Leave if they are an employee of a non-federal public agency. Thus, employees who work for the government of a State, the District of Columbia, a Territory or possession of the United States, a city, a municipality, a township, a county, a parish, or a similar entity are likely eligible for Emergency Family

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and Medical Leave.

Federal employees are likely not entitled to Emergency Family and Medical Leave, because the Emergency Family and Medical Leave Expansion Act amended only Title I of the FMLA, and most Federal employees are covered by Title II. Further the OMB has authority to exclude some categories of U.S. Government Executive Branch employees with respect to Emergency Family and Medical Leave. Federal employees are encouraged to seek guidance from their employers as to their eligibility. Further, health care providers and emergency responders may be excluded from eligibility by their employers, as discussed in greater detail below.

(23) For purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 may be relied upon as a qualifying reason for Emergency Paid Sick Leave, a "health care provider" includes a licensed doctor of medicine, nurse practitioner, or other health provider permitted to use a certification for purposes of the FMLA. The FMLA defines "health care provider" as a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary of Labor to be capable of providing health care services." The FMLA also recognizes any health care provider accepted by the employer's group health (or equivalent) plan.

(24) For purposes of determining individuals who may be excluded by their employer from Emergency Paid Sick Leave and/or Emergency Family and Medical Leave, the term "health care provider" includes 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 includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain 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 or territory's or the District of Columbia's response to COVID-19.

The Department of Labor encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA to minimize the spread of the virus associated with COVID-19.

(25) For purposes of determining individuals who may be excluded by their employer from Emergency Paid Sick Leave and/or Emergency Family and Medical Leave, "emergency responder" includes an employee who is necessary for the provision of transport, care,

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health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of 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, 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 also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

As with health care providers, the Department of Labor encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA to minimize the spread of the virus associated with COVID-19.

(26) A small business (fewer than 50 employees) may claim exemption from the requirements of the Emergency Paid Sick Leave Act (for leave related to school/daycare closure/unavailable child care provider only) and Emergency Family and Medical Leave Expansion Act when: a) the provision of such leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; b) the absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or c) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity. Small businesses include religious or nonprofit organizations. The DOL further clarified that a small business is exempt from the Emergency Paid Sick Leave or Expanded Family and Medical Leave requirements only if: 1) the employer employs fewer than 50 employees; 2) leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and 3) an authorized officer the business has determined that *at least one* of the three conditions described in a), b), or c) of this point is satisfied.

Again, the above is only some of the implementation guidance from the DOL. In addition to the Q&A, the DOL is expected to be issuing regulations in the coming weeks to further assist with implementation and compliance. Lastly, we notice that the DOL is updating the Q&A that it previously posted, and thus employers should make sure they make decisions based on the most up-to-date information available. Employers with questions about FFCRA, FMLA, other employee illness, or disability and/or medical leave laws should consult with their MBJ attorney.

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