

**April 1, 2020**

***Letter to Archdiocesan Ministries Re: the Family First CoronaVirus Response Act***

*Dear Pastors, Principals, Program Directors, Finance/HR Staff & Site Administrators:*

On March 18, 2020, President Trump signed into law H.R. 6201, the “Families First Coronavirus Response Act” (the “Act”). The Act provides for changes to the law that affect employers and employees (both salaried and hourly) under certain conditions related to the COVID-19 or Coronavirus public health crisis in the United States.

The subsections of the Act most relevant are Division C – Emergency Family and Medical Leave Expansion Act (“EFMLEA”), Division E – Emergency Paid Sick Leave Act (“EPSLA”), and Division G – Tax Credits for Paid Sick and Paid Family and Medical Leave. You will find a summary of the relevant provisions of each subsection below.

Please note that the Act is effective April 1, 2020 through December 31, 2020. *There is a grace period for compliance through April 17<sup>th</sup> as long as the Employer is making a good faith effort.* During this time, employers are still governed by the existing federal employment laws as well as their own policies on employment, including sick leave and paid-time-off policies. Please also note that the Department of Labor and the IRS are expected to issue regulations, guidance, and forms in connection with the Act in the coming days and week. Therefore, the information below is necessarily incomplete and subject to change pending additional information released by the government. Please consult with the Archdiocese’s Offices of Human Resources, Legal Services and / or Finance and Administration if you have any questions about this information.

*As additional, relevant information becomes available, we will do our best to update Archdiocesan ministries accordingly.*

***EXCEPTIONS and EXCLUSIONS:***

Both the Emergency Family & Medical Leave Expansion Act and the Emergency Paid Sick Leave Act states that the Secretary of Labor has the *authority to exclude health care providers and emergency responders from being eligible to receive these additional paid leaves.* The Secretary of Labor has not issued any such regulations yet, but it is possible that such regulations will be issued in the coming weeks. The EFMLEA and the EPSLA states that employees who are health care providers<sup>1</sup> or emergency responders can already be excluded from this additional paid sick leave at the discretion of their employer. The Department of Labor guidance requests that employers be “judicious” in their discretionary exclusion of health care providers in an attempt to further reduce the spread of COVID-19.

*The Secretary of Labor has exempted employers with fewer than 50 employees from the requirement to make this emergency paid leave available to employees who would otherwise be eligible under category 5) above “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”* To meet this standard, an authorized officer of the business must determine that 1) the provision of the emergency paid leave would result in the business’s expenses and financial obligations exceeding available business

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<sup>1</sup> A “health care provider” is “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. It also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility.

revenues and cause the business to cease operating at minimal capacity; 2) the absence of the employee(s) requesting emergency paid leave would entail a substantial risk to the financial health or operational capacities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or 3) there are not enough workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services provided by the employee(s) requesting emergency paid leave, and these services are needed for the business to operate at a minimal capacity. The Department of Labor may be issuing additional guidance or regulations to clarify this standard, however, if you have fewer than 50 employees, you will need to document why you meet the criteria for the exemption.

## **I. The Emergency Family and Medical Leave Expansion Act (“EMFLEA”)**

This subsection of the Act amends the Family and Medical Leave Act of 1993 (the “FMLA”) and requires certain employers to provide up to 12 weeks of FMLA leave to certain eligible employees due to a need to care for their children as specified below. This section is another qualifying reason to receive FMLA leave, it does not provide for 12 weeks of leave in addition to what was already required under the FMLA. Employees who have already partially or completely used FMLA leave during the 12-month period (as determined by their employer) are not eligible for the amounts of leave they have already used. Similarly, taking this emergency FMLA leave reduces an employee’s later entitlement to pre-existing FMLA leave.

The EMFLEA also states that the Secretary of Labor has the authority to exclude health care providers and emergency responders from being eligible to receive this emergency FMLA leave. The Secretary of Labor has not issued any such regulations yet, but it is possible that such regulations will be issued soon. However, the EMFLEA also states that employees who are health care providers<sup>2</sup> or emergency responders can already be excluded from the emergency FMLA leave at the discretion of their employer. The Department of Labor guidance requests that employers be “judicious” in their discretionary exclusion of health care providers in an attempt to further reduce the spread of COVID-19.

The Secretary of Labor has exempted employers with fewer than 50 employees from the requirement to make this emergency paid leave available “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” To meet this standard, an authorized officer of the business must determine that 1) the provision of the emergency paid leave would result in the business’s expenses and financial obligations exceeding available business revenues and cause the business to cease operating at minimal capacity; 2) the absence of the employee(s) requesting emergency paid leave would entail a substantial risk to the financial health or operational capacities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or 3) there are not enough workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services provided by the employee(s) requesting emergency paid leave, and these services are needed for the business to operate at a minimal capacity. The Department of Labor may be issuing additional guidance or regulations to clarify this standard, however, if you have fewer than 50 employees, you will need to document why you meet the criteria for the exemption.

### **Eligibility**

- Employers covered by the EMFLEA are those employers with fewer than 500 employees.

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<sup>2</sup> A “health care provider” is “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. It also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility.

- Eligible employees are persons, who have been employed for at least 30 days by a covered employer and who are unable<sup>3</sup> to work (or telework) due to a need for leave to care for their child under the age of 18 years old if:
  - 1) their child’s school or place of care has been closed due to the COVID-19 emergency as declared by a federal, state, or local authority, or
  - 2) their child care provider is unavailable due to the COVID-19 emergency as declared by a federal, state, or local authority. A “child care provider” is someone who “receives compensation for providing child care services on a regular basis.”<sup>4</sup>
- An employee is also eligible for this emergency FMLA leave if the employee was terminated on or after March 1, 2020, but then subsequently rehired, as long as the employee was employed by the employer for at least 30 of the 60 days prior to his termination date.
- Once an employer closes, employees are not eligible for the emergency FMLA leave. In other words, if the employer closes before the employee requests the emergency paid leave, the employee is not eligible for the emergency paid leave. If the employer closes while the employee is currently taking emergency paid leave, the employer must pay for any leave used before the employer closed, but not as of or after the date the employer closes. The Department of Labor’s guidance does not explicitly define what it means to “close,” but it suggests that “closing” means when an employer sends employees home and stops paying them because the employer does not have work for the employee to do. Presumably if the employer continues to pay employees who are able to work and have not requested leave, the employer is not “closed,” although further guidance on this will be needed.
- If an employer remains open, but furloughs an employee due to not having enough work or business for the employee to do, then that employee is not entitled to the emergency paid leave. Similarly, if the employer reduces the employee’s scheduled work hours because it does not have enough work for the employee, the employee cannot use the emergency paid leave to make up for the reduced work hours.

The EMFLEA also states that the Secretary of Labor has the authority to exclude health care providers and emergency responders from being eligible to receive this emergency FMLA leave. The Secretary of Labor has not issued any such regulations yet, but it is possible that such regulations will be issued soon. However, the EMFLEA also states that employees who are health care providers<sup>5</sup> or emergency responders can already be

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<sup>3</sup> If an employee can work the normal amount of hours but must simply do it outside of the normal schedule, the employee is considered able to work and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.

<sup>4</sup> This definition of “child care provider” is based on our current reading of the Act. This section of the Act is ambiguous as to the exact meaning of who qualifies as a “child care provider.” It is possible that a person who is the grandparent, great-grandparent, aunt, uncle, or non-resident sibling of the child may also be considered a child care provider even if they do not receive compensation. Future guidance issued by the Department of Labor or IRS may provide further clarification before these provisions take effect, employers may desire to err on the side of caution and permit FMLA leave to employees whose now unavailable child care provider fits one of the above described relationships.

<sup>5</sup> A “health care provider” is “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. It also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility.

excluded from the emergency FMLA leave at the discretion of their employer. The Department of Labor guidance requests that employers be “judicious” in their discretionary exclusion of health care providers in an attempt to further reduce the spread of COVID-19.

The Secretary of Labor has exempted employers with fewer than 50 employees from the requirement to make this emergency paid leave available “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” To meet this standard, an authorized officer of the business must determine that 1) the provision of the emergency paid leave would result in the business’s expenses and financial obligations exceeding available business revenues and cause the business to cease operating at minimal capacity; 2) the absence of the employee(s) requesting emergency paid leave would entail a substantial risk to the financial health or operational capacities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or 3) there are not enough workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services provided by the employee(s) requesting emergency paid leave, and these services are needed for the business to operate at a minimal capacity. The Department of Labor may be issuing additional guidance or regulations to clarify this standard, however, if you have fewer than 50 employees, you will need to document why you meet the criteria for the exemption.

### **Emergency FMLA Leave**

Employees who request emergency FMLA leave to care for children when the school or place of care is closed, or the child care provider is unavailable, due to COVID-19 must provide documentation to the employer related to the request. Employers should require employees to provide the appropriate documentation just as they would for conventional FMLA leave requests, including a notice of closure or unavailability that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee of the school, place of care, or child care provider. All of this documentation should be retained for the purpose of claiming the tax credit.

Assuming the employer is covered as set forth above and the employee is eligible as set forth above, the Act provides for 12 weeks of emergency FMLA leave that would be issued as follows:

The first 10 days (2 weeks) of requested FMLA leave may consist of unpaid leave. An employee can choose to substitute vacation leave, personal leave, or medical/sick leave for this unpaid leave. An employer cannot require the employee to take such paid leave in lieu of the FMLA leave, however. After the 10 days, the employer must provide paid leave for the remaining 10 weeks at a rate of two-thirds of the employee’s regular rate of pay for the number of hours the employee would otherwise normally be scheduled to work.<sup>6</sup> However, the amount of paid leave may not exceed \$200 per day and may not exceed \$10,000 in total.

If employers permit, employees can elect to supplement the emergency paid leave with other paid leave already available from the employer up to (but not over) their normal amount of pay. For example, if an employee is only receiving two-thirds of normal pay while on the emergency FMLA leave, the employee could supplement that with other available paid leave from the employer to get the additional one-third of normal pay.

The Act does not change other FMLA provisions already in force. For example, FMLA leave can be taken in periods of weeks, days, or hours, so an employee could take partial FMLA leave for a number of hours during the day to care for children. In such a case, the amount of FMLA leave taken would be calculated normally under the FMLA – in other words, the hours of leave taken would be divided by the number of hours the

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<sup>6</sup> There is a special provision to calculate the number of hours an employee would have worked for employers unable to determine the number of hours the employee would have worked if leave were not taken. Please consult the Archdiocesan Human Resources Director, Karen Heil, for further information if you believe that this applies to one of your employees.

employee would have worked if the employee had not taken leave to determine the proportion of the FMLA workweek used. In cases such as these, employers should be sure to verify with employees the exact amount of leave that is being requested and used.

### **Job Restoration Provision**

The Act also provides that employers with fewer than 25 employees are exempt from the FMLA's normal job restoration requirements if the following conditions are met: 1) the employee's job no longer exists due to economic conditions caused by the COVID-19 emergency, 2) the employer makes reasonable efforts to restore the employee to an equivalent position, and 3) an equivalent position does not become available within a year.

Generally, employers should be mindful of other existing and applicable laws and provisions related to FMLA leave, including those that prohibit terminating employees because they have requested or taken FMLA leave.

## **II. The Emergency Paid Sick Leave Act ("EPSLA")**

This subsection of the Act requires certain employers to provide up to 2 weeks of paid sick leave to certain eligible employees. Unlike the emergency FMLA leave, this emergency paid sick leave is in addition to any pre-existing paid leave that may have been available to employees.

### **Eligibility**

- Employers covered by the EPSLA are those employers with fewer than 500 employees.
- Eligible employees are persons, who are unable<sup>7</sup> to work (or telework) due to a need for leave because:
  - 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 in category 1) or has been advised as in category 2);
  - 5) The employee is caring for his or her child if the child's school or place of care is closed, or the child's child care provider is unavailable, due to COVID-19 precautions; or
  - 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

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<sup>7</sup> If an employee can work the normal amount of hours but must simply do it outside of the normal schedule, the employee is considered able to work and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.

of Labor.<sup>8</sup>

- An employee is also eligible for this emergency paid sick leave if the employee was terminated on or after March 1, 2020, but then subsequently rehired, as long as the employee was employed by the employer for at least 30 of the 60 days prior to his termination date.
- Once an employer closes, employees are not eligible for the emergency paid sick leave. In other words, if the employer closes before the employee requests the emergency paid leave, the employee is not eligible for the emergency paid leave. If the employer closes while the employee is currently taking emergency paid leave, the employer must pay for any leave used before the employer closed, but not as of or after the date the employer closes. The Department of Labor's guidance does not explicitly define what it means to "close," but it suggests that "closing" means when an employer sends employees home and stops paying them because the employer does not have work for the employee to do. Presumably if the employer continues to pay employees who are able to work and have not requested leave, the employer is not "closed," although further guidance on this will be needed.
- If an employer remains open, but furloughs an employee due to not having enough work or business for the employee to do, then that employee is not entitled to the emergency paid leave. Similarly, if the employer reduces the employee's scheduled work hours because it does not have enough work for the employee, the employee cannot use the emergency paid leave to make up for the reduced work hours.

The EPSLA also states that the Secretary of Labor has the authority to exclude health care providers and emergency responders from being eligible to receive this additional paid sick leave. The Secretary of Labor has not issued any such regulations yet, but it is possible that such regulations will be issued in the coming weeks. However, similar to the EMFLEA in the previous section, the EPSLA also states that employees who are health care providers<sup>9</sup> or emergency responders can already be excluded from this additional paid sick leave at the discretion of their employer. The Department of Labor guidance requests that employers be "judicious" in their discretionary exclusion of health care providers in an attempt to further reduce the spread of COVID-19.

The Secretary of Labor has exempted employers with fewer than 50 employees from the requirement to make this emergency paid leave available to employees who would otherwise be eligible under category 5) above "when the imposition of such requirements would jeopardize the viability of the business as a going concern." To meet this standard, an authorized officer of the business must determine that 1) the provision of the emergency paid leave would result in the business's expenses and financial obligations exceeding available business revenues and cause the business to cease operating at minimal capacity; 2) the absence of the employee(s) requesting emergency paid leave would entail a substantial risk to the financial health or operational capacities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or 3) there are not enough workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services provided by the employee(s) requesting emergency paid leave, and these services are needed for the business to operate at a minimal capacity. The Department of Labor may be issuing additional guidance or regulations to clarify this standard, however, if you have fewer than 50 employees, you will need to document why you meet the criteria for the exemption.

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<sup>8</sup> This provision will require further regulatory guidance as no substantially similar conditions have yet been identified by the specified government officials.

<sup>9</sup> A "health care provider" is "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. It also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility.

## **Emergency Paid Sick Leave**

Employees who request emergency paid sick leave must provide documentation to the employer related to the request. Employers should require employees to provide their name, qualifying reason for requesting leave, a statement that the employee is unable to work (including telework) for that reason, and the date(s) for which leave is requested. Depending on the qualifying reason for requesting leave, documentation for that will also be necessary. For example, if the basis for the leave is a quarantine or isolation order – what the source of the order is and a copy of the quarantine or isolation order applicable to the employee. If the basis for the leave is advice of a health care provider to self-quarantine – the name of the health care provider and written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19. All of this documentation should be retained by employers for the purpose of claiming the tax credit.

Assuming the employer is covered as set forth above and the employee is eligible as set forth above, the Act provides for 2 weeks of additional paid sick leave that would be issued as follows:

A full-time employee is entitled to 80 hours of paid sick leave. A part-time employee is entitled to paid sick leave in the amount of hours equal to the number of hours the employee would normally work on average over a 2-week period.<sup>10</sup> However, paid sick leave may not exceed \$511 per day or \$5,110 total for an employee who is eligible under categories 1), 2), or 3) above. For employees who are eligible under categories 4), 5), or 6) above, paid sick leave may not exceed \$200 per day or \$2,000 total. Emergency paid sick leave under the EPSLA does not carry over to the next year. Additionally, employees are not entitled to be reimbursed for emergency paid sick leave that was not used prior to termination.

If employers permit, employees can elect to supplement the emergency paid leave with other paid leave already available from the employer up to (but not over) their normal amount of pay. For example, if an employee is only receiving two-thirds of normal pay while on the emergency paid sick leave, the employee could supplement that with other available paid leave from the employer to get the additional one-third of normal pay.

If an employee qualifies for both the emergency FMLA leave described in Section I above and this emergency paid sick leave discussed in Section II, the two types of leave are complementary and work together. Employees qualifying for both types of leave would take the 2 weeks (80 hours) of emergency paid sick leave during the initial 2 weeks of unpaid FMLA leave, before taking the subsequent 10 weeks of emergency paid FMLA leave. In other words, employees qualifying for both types of leave may receive 12 weeks of paid leave; they do not receive 12 weeks of paid leave and 2 weeks of unpaid leave.

Employers may not require employees to find replacement employees to cover hours during the sick leave as a condition of providing the paid sick leave. An employer may not require an employee to use other paid leave before the employee uses the emergency paid leave available under the EPSLA.

For the most part, the Act does not change the employer's paid sick leave provisions already in force. For example, if the employer allows paid sick leave to be taken in hourly increments, an employee could take emergency paid sick leave for a number of hours during the day, if the employee is teleworking at other times. If an employee is not teleworking and only works in-person at the jobsite, only employees who are eligible for the emergency paid leave under the child care qualifying reason may take hourly leave. For example, employees who are taking emergency leave due to a quarantine order or being advised to self-quarantine may only take paid

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<sup>10</sup> There is a special provision to calculate the number of hours an employee would have worked for employers unable to determine the number of hours the employee would have worked if leave were not taken. Please consult the Archdiocesan Human Resources Director, Karen Heil, for further information if you believe that this applies to one of your employees.

sick leave on a consecutive daily basis until it is all used or until the qualifying reason no longer exists. The purpose for this is to ensure that employees who may be exposed to COVID-19 do not enter the workplace but instead stay at home to prevent the spread of the disease.

Emergency paid sick leave under the EPSLA is in addition to any other paid sick leave, paid vacation leave, or other paid time off that may be provided for in the employer's existing policies. An employee's use of this emergency paid sick leave does not reduce or diminish other paid time off or other benefits the employee may have under current employment policies.

### **Other Requirements**

Employers must place notices of the requirements of the EPSLA on their premises. The Secretary of Labor is preparing a model notice that can be used by employers to satisfy this requirement, but the model notice has not been issued yet.

Employers cannot discriminate against any employees taking or seeking to take this emergency paid sick leave, including by termination, discipline, or otherwise.

### **III. Health Coverage**

If an employer provides group health coverage, employees are entitled to continue that coverage during any emergency paid leave, but the employee must continue to make any normal contributions to the cost of coverage.

### **IV. Tax Credits**

The Act also provides for tax credits to employers that provide additional paid sick leave or emergency FMLA leave as outlined in Sections I and II above.

For each quarter, employers are allowed a credit against payroll taxes for 100% of the qualified emergency paid sick leave wages and emergency FMLA leave wages paid during that quarter. Businesses can retain funds that would otherwise be deposited with the IRS to pay for payroll taxes to pay the full cost of any emergency paid leave under the Act. For example, if an eligible employer paid \$5,000 in sick leave and emergency FMLA leave and would be otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer is only required to deposit the remaining \$3,000 on its next regular deposit date.

If the costs of emergency paid leave under the Act exceed the amount of payroll taxes that would otherwise be due, the excess amount will be treated as overpayment and employers can receive a "refund" credit from the IRS, by submitting a claim form, which the IRS has stated will be released next week. For example, if an eligible employer paid \$8,000 in sick leave and emergency FMLA leave, but would otherwise be required to deposit only \$5,000 in payroll taxes, the employer could submit a claim form to the IRS for a refund credit of \$3,000. The IRS has announced that it will send the refund credit to businesses as quickly as possible, potentially within two weeks after the refund form is filed. The IRS will also announce further details of the refund claim process soon.

If an employer permits an employee to supplement the emergency paid leave with other paid leave already available from the employer in order to reach the employee's normal amount of pay, the employer will



not receive tax credits for any supplemental amounts. However, allowing employees to supplement emergency paid leave with already existing paid leave does not jeopardize an employer's ability to receive tax credits.

Employers may also pay their employees in excess of the emergency paid leave requirements, but no excess amounts paid will be able to be claimed as tax credits. Issuing supplemental pay would not appear to jeopardize employers' ability to claim tax credits for the emergency paid leave that is issued, but employers should be aware of normal potential discrimination issues. For example, employers who supplement pay for employees on paid sick leave, but not on paid FMLA leave may be engaging in FMLA discrimination.

Eligible employers will also be entitled to a tax credit for their costs related to eligible employees' health insurance coverage during the emergency leave periods. More clarity on this credit is anticipated to be announced in the coming days.

Employers may also defer required federal tax deposits incurred between March 27, 2020 and December 31, 2020, for their share (6.2%) of the Old-Age Survivors, and Disability Insurance Tax (Social Security) under IRC Section 3111(a), as long as 50% of the deferred amount is paid by December 31, 2021, with the remainder paid by December 31, 2022.

### **Conclusion**

Please note that the Department of Labor and the IRS are expected to issue regulations, guidance, and forms in connection with the Act in the coming days and week. Therefore, the information above is necessarily incomplete and subject to change pending additional information released by the government. We will provide updated information and guidance as it becomes available.

We will provide a COVID-19 | Families First Resource page on our [HR Downloads page](#) with links to all Dept. of Labor documents.

Please reach out to any of our Chancery Office Staff with your questions.

*Wishing you God's Peace and in gratitude for all of your efforts in this time.*

*Sincerely,*

*~ Karen K. Heil*

*Susan A. Zeringue*

*Director, Human Resources*

*General Counsel*