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## Families First Coronavirus Response Act – It's Final and Here's What Requires

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***The President has signed the Families First Coronavirus Response Act (FFCRA), originally introduced in the House as H.R. 6201. The final version is significantly scaled back from the original. There are still 2 significant sections related to employee absences: expansion of FMLA coverage for school and day care closures, and paid sick leave for a multitude of reasons. Here is a recap of the provisions as passed that will go into effect on April 2, 2020.***



### EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

**Effective dates.** Effective on April 2, 2020; sunsets on December 31, 2020 (unless extended, of course).

**Employee eligibility.** Applies to employees who have worked for 30 calendar days for the employer from whom they request leave. The DOL is authorized to draft regulations excluding certain health care providers and emergency responders from eligibility.

**Covered employers.** Applies to employers with fewer than 500 employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."

- So, if an employer has 500+ employees and then drops below 500, coverage is not immediate but would take a total of 20 weeks at the under-500 level. Those weeks do not need to be consecutive, but total within the current calendar year.
- Likewise, if an employer has under 500 employees now and is covered, then increases to 500 or more employees, it will take 20 weeks total at that level in 2020 before the employer moves out from under coverage.

There are no limitations regarding number of employees at a work site.

The Act has a provision authorizing the U.S. Department of Labor to issue regulations to exempt small business (fewer than 50 employees) from the requirements of the FFCRA "when the imposition of such requirements would jeopardize the viability of the business as a going concern." It remains to be seen whether the DOL will be able to implement such regulations before the April 2 effective date.

**Covered leave reason and duration.** The law adds FMLA job-protected time off ONLY to care for a son or daughter under 18 whose school or place of care has been closed or the child care provider for the son or daughter is unavailable due to a public health emergency specifically relating to COVID-19. However, leave is not available unless the employee is "unable to work (or telework) due to a need for leave." This additional leave type is included within the existing FMLA 12-week total. The Act is silent regarding intermittent leave usage; most likely, intermittent usage is permissible.

"Son or daughter" is not specifically defined in the FFCRA so presumably the usual FMLA definition applies (a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis) except, as noted above, coverage is limited to closures for a son or daughter under 18.

"School" is defined as an elementary or secondary school. "Child care provider" means a provider who receives compensation for providing child care services on a regular basis.

**Paid FMLA time.** The first 10 days of FMLA leave are unpaid, although the employee can elect to use accrued vacation leave, personal leave, or medical or sick leave. (And, see the provisions relating to paid sick leave below.) After that, the FMLA time is paid at 2/3 the employee's usual rate of pay for each day of leave, but with caps of \$200 per day and \$10,000 total per employee. FFCRA contains a provision for calculating pay for an employee with a variable schedule.

**Notice requirements.** Employees must give employers such advance notice of the need for leave as is practicable. There is no specific notice requirement from employers to employees; assume that all the usual FMLA notices (posting, rights and responsibilities, eligibility, etc.) will be fully applicable.

**Job protections.** Generally, employees will be entitled to the usual FMLA job protections (reinstatement to same or equivalent position) after COVID-19-related leave. Employers with fewer than 25 employees may be excused from job restoration requirements if the situation meets certain conditions, including that the job has been eliminated due to factors related to COVID-19 and the employer makes efforts to restore the employee to an equivalent position for a period of 12 months following the end of the employee's leave.

**Multi-Employer Bargaining Agreements.** Employers who are part of a multi-employer collective bargaining agreement may satisfy their obligations under the FFCRA by paying amounts employees are entitled to into the multi-employer fund, as long as employees are able to access the fund for appropriate FFCRA payments.

## EMERGENCY PAID SICK LEAVE ACT

**Effective dates.** Effective on April 2, 2020; sunsets on December 31, 2020 (unless extended).

**Eligible employees.** There are no eligibility requirements. Employees can take this paid sick time immediately upon its effective date.

**Covered employers.** Again, applies to employers with fewer than 500 employees. See the discussion above on how this is calculated.

**Covered leave reasons.** An employee may use paid sick leave to the extent that the employee is unable 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 as described in paragraph (1) or has been advised as described in paragraph (2). *Note there appears to be no limit on who*

this "individual" may be, and no requirement that it be a family member.

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. "Son or daughter" is not specifically limited to those under age 18 but is expected to be interpreted consistently with the FMLA Expansion Act.
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.

*NOTE: An employer of an employee who is a health care provider or emergency responder may elect to exclude such employee from the application of this leave requirement.*

**Amount of time off and pay.** The amount of paid time off available is 80 hours for full-time employees; and the average number of hours typically worked over a 2-week period for part-time employees. Leave for reasons (1), (2) and (3) is paid at the greater of the employee's full pay or federal, state, or local minimum wage, but now capped at \$511 per day or \$5,110 total. Leave for reasons (4), (5), and (6) is at 2/3 pay, now capped at \$200 per day or \$2,000 total.

**Interaction with employer's other paid leave policies.** The employee may use paid sick leave provided under FFCRA first, then other employer-provided paid leave as needed. The employer cannot require sequence of usage otherwise.

**Notices.** After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time. Employers must post a notice of employee rights in conspicuous places on the employer's premises. The DOL must provide a model notice for this purpose within 7 days after enactment, or by March 25.

**Employer Tax Credits for Paid Leave.** I don't pretend to be a tax expert so please consult your own attorney or accountant on this. Generally, though, it appears the FFCRA includes provisions for 100% tax credits for amounts employers pay under the new law, including both the FMLA paid leave and the paid sick leave requirements. The tax credits go against Social Security taxes owed by the employer. If this does not yield 100% credit for amounts paid, the excess is refundable to the employer.

## IS IT FRIDAY YET?

Remember when the days were long, the nights were warm and the government leave programs didn't come two at a time? That was cool. But here we are, and there are more piling up behind this. Rest assured we will continue working overtime to keep you informed. And our account managers are working overtime, too, so that we can help employers stay safe while they figure out how to keep their employees safe. Have a question? Reach out. Have the weekend off? Take it. Relax, and be thankful; and I will talk to you soon – very soon!



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