

Families First Coronavirus Response Act Enacted Into Law

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On March 18, 2020, the President signed the Families First Coronavirus Response Act (“FFCRA”) into law, after its passage in the U.S. Senate. The bill was first passed in the U.S. House of Representatives on March 13, 2020 and was then revised on March 16, 2020. It contains sweeping emergency paid sick leave and paid FMLA requirements for employers with less than 500 employees, as well as government employers, in response to COVID-19.

Summary

- **Effective Date:** The employer-related provision of the FFCRA are effective 15 days after enactment, which is Thursday, April 2, 2020. The requirements will expire on December 31, 2020.
- **Covered Employer:** The FFCRA applies to all employers with fewer than 500 employees, as well as all government employers.
 - No guidance has been issued as to whether integrated or related business entities with 500 or more employees combined are excluded from coverage.
 - There are no exceptions for not for profit organizations.
 - There are limited exceptions for certain smaller employers and employers of health care providers and first responders discussed more below.
- **Key Requirements/Provisions:** The FFCRA contains six primary relief measures of importance to employers:
 - Up to two weeks of paid leave to all employees for certain COVID-19 related matters;
 - Family and Medical Leave Act expansion to provide partially paid leave to care for the employee’s child, if the child’s school or other place of care has been closed, or the child care provider is unavailable, due to a COVID-19 related emergency as declared by the Federal, State or local government;
 - Similar leave for employees of employers who are parties to a multi-employer collective bargaining agreement in cases where those employers contribute to a multi-employer benefit plan;
 - Tax credits equal to 100% of the FFCRA-mandated paid leave wages paid by an employer each calendar quarter subject to certain caps (the tax credits are **not** available for government employers), the Medicare taxes owed on those wages, and the expenses associated with maintaining group health plan coverage associated with those wages;
 - Greater access to unemployment insurance for employees who are off work for certain reasons related to COVID-19; and
 - Coverage of COVID-19 testing at no cost under health plans.

Here are the key points of each relief item noted above:

Emergency Paid Sick Leave Act

- **Summary:** This is a new statute requiring employers with fewer than 500 employees and government employers to provide **all** employees up to two weeks of paid sick leave for certain qualifying COVID-19 related absences for immediate use until December 31, 2020.
- **Effective Date:** The requirements are effective April 2, 2020. The requirements expire on December 31, 2020.
- **Immediate Use:** Paid sick time is available for immediate use regardless of an employee's length of employment.
- **Small Business Exemption:** The U.S. Secretary of Labor has the authority to issue regulations exempting small businesses with fewer than 50 employees when the imposition of the requirements would jeopardize the viability of the business as a going concern.
- **Note:** It is unclear whether and when such exemption will occur.

- **Health Care Providers / Emergency Responders Exclusion:** Employers of certain health care providers or emergency responders may elect to exclude such employees from the application of this rule. The U.S. Secretary of Labor also has authority to issue regulations exempting such employees.
- **Reasons for Use:** An employee qualifies for emergency paid sick time, assuming the employee cannot work or telework, for any of the following six reasons:
 - The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - **Note:** No guidance has been provided as to how broadly this provision will be read.
 - The employee has been advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - The employee is caring for an individual who is subject to government quarantine or isolation order or has been advised by a health care provider to self-quarantine as described above;
 - The employee is caring for a child because the child's school or place of care has been closed, or the childcare provider of such child is unavailable, due to COVID-19 precautions; and
 - The employee is experiencing any other substantially similar condition specified by the U.S. Secretary of Health and Human Services, in consultation with the U.S. Secretaries of Treasury and Labor.

- **Hours:**
 - Full-time employees receive up to 80 hours.
 - Part-time employees:
 - Part-time employees receive the average number of hours of work they work over a two-week period.
 - If the part-time employee's schedule varies, the employee receives the average number of hours scheduled per day over the prior six-month period, including hours for which the employee took any type of leave.
 - If neither is calculable, the part-time employee receives the amount the employee expected to work when hired.
- **Rate of Pay & Caps:**
 - For absences related to the **employee's own care** (the first three reasons listed above), the employee receives the greater of the employee's regular rate of pay or the applicable minimum wage, but pay is capped at \$511 per day or \$5,110 in total.

- For absences to **care for others** (the last three reasons listed above), the employee receives two-thirds of the employee's regular rate or the applicable minimum wage, but pay is capped \$200 per day or \$2,000 in total.
- These limits match the caps on the tax credits discussed below.
- The U.S. Secretary of Labor is to issue guidelines to assist employers in calculating rates of pay.
- **No Carryover / Payout:** There is no carryover of unused hours into subsequent years or payout upon termination.
- **Interaction with Existing Policies:**
 - Employees have the right to choose to use paid emergency sick leave before existing paid time off benefits (PTO, vacation, personal days, sick days, etc.).
 - An employer may not require any employee to use the employer's other paid time off benefits (PTO, vacation, personal days, sick days, etc.) prior to the use of paid sick time under the new law.
 - The law does not diminish an employee's right to pay under any other Federal, State or local law, collective bargaining agreement, or existing employer policy. In other words, this paid sick time is in addition to time already available under an employer's existing policies.
 - **Note:** Language that would have prevented employers from changing existing paid time off policies, including any new emergency paid time off granted by employers in response to COVID-19, appears to have been removed but this remains unclear.
- **Notice:** An employer may require reasonable notice from an employee to continue to receive paid sick time. (No clarifying guidance has been published as to this point.)
- **Return to Work:** Even if an employee has not used all the paid sick time, the employee must return to work at the employee's next scheduled work shift after the need for leave ends.
- **Replacements:** An employer may not require an employee to find a replacement when using paid sick time under the law.
- **No Discrimination or Retaliation:** No discrimination or retaliation is permitted against employees for taking paid sick leave under the new law or for reporting complaints, testifying or instituting proceedings related to the law.
- **Poster:** The U.S. Department of Labor will be creating a required posting within seven days of the enactment of the new law.
- **Penalties/Remedies:** A violation of the law, including failure to pay or wrongful termination, is a minimum wage violation under the Fair Labor Standards Act. The penalties include lost wages, an equivalent amount as liquidated damages, and attorney's fees and costs. Intentional violations may result in up to a \$10,000 fine and, for repeat offenders, up to six months in prison after a prior conviction.
- **No Social Security Taxes on Wages:** The wages required to be paid for emergency sick leave are not taken into account for purposes of determining Social Security taxes owed by the employer.
- **Health Care Providers:** Has the same broad definition as in the FMLA (*g.*, doctors, licensed nurse practitioners, physician assistants, among many other health care providers).
- **Son or Daughter:** Has the same broad definition as in the FMLA (biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that leave is to commence).

Family and Medical Leave Act (FMLA) Expansion

- **Summary:** The FMLA has been amended to require employers with fewer than 500 employees and government employers to provide employees who have been on the job for at least 30 days with 12 weeks of job-protected leave for qualifying COVID-19 related absences, until December 31, 2020.
- **Effective Date:** The requirements are effective on April 2, 2020. The requirements expire on December 31, 2020.

- **Small Business Exemptions Possible:**
 - The U.S. Secretary of Labor may issue regulations to exempt small businesses with fewer than 50 employees (as measured under the FMLA) when the imposition of the new requirements would jeopardize the business as a going concern.
 - **Note:** It is unclear whether and when such exemption will occur.
 - Such employers may not be sued in private actions by employees but are subject to civil and administrative actions by the U.S. Secretary of Labor.
 - There is also a limited exception to the job restoration requirement for employers with fewer than 25 employees discussed below.
- **Health Care Providers / Emergency Responders Exclusion:** Employers of certain health care providers or emergency responders may elect to exclude such employees from the application of this rule. The U.S. Secretary of Labor also has authority to issue regulations exempting such employees.
- **Eligibility:** All full-time, part-time, and temporary employees who have been employed with an employer for 30 calendar days. There is no minimum number of hours worked required.
- **Qualifying Absence:** An employees may use leave if the employee is unable to work (or telework) due to a need for leave to care for the employee's child under 18 years of age if the child's school or other place of care has been closed, or the child care provider of such child is unavailable, due to a public health emergency.
 - **Note:** This is much narrower than the original House Bill.
- **Paid v. Unpaid Leave:**
 - The first ten days are generally unpaid (but see the Emergency Paid Sick Leave Act requirement of two weeks' paid sick leave above).
 - An employee may elect to substitute any paid time off for the unpaid portion of leave (e., the first ten days), including the new emergency paid sick leave or existing PTO, vacation, personal days, sick days, etc. However, an employer cannot require it.
 - After the first ten days, the remaining time off, up to the 12-week maximum of FMLA leave, must be paid at two-third of the employee's regular rate (using the same hours and rate of pay calculations described above for the Emergency Paid Sick Leave Act).
 - The paid FMLA leave is capped at no more than \$200 per day and \$10,000 total.
 - These limits match the caps on the tax credits discussed below.
- **Notice:** If the need for leave is foreseeable, an employee must provide notice as soon as practicable.
- **Restoration to Position:**
 - Employers with 25 or more employees must return employees to the same or a substantially equivalent position under the existing FMLA rules.
 - Employers with less than 25 employees are not required to return the employee to work (after the leave) but only if each of the following conditions are met:
 - The employee takes leave to care for the employee's child because the child's school or other place of care has been closed, or the childcare provider of such child is unavailable due a COVID-19 related emergency declared by a Federal, State or local authority.

- The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave.
- The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.
- If the reasonable efforts of the employer fail, the employer makes reasonable efforts to contact the employee if an equivalent position described becomes available. This “contact period” remains in effect for the one-year period beginning on the earlier of: (a) the date on which the qualifying need related to a public health emergency concludes; or (b) the date that is 12 weeks after the date on which the employee’s leave commences.
- **No Discrimination or Retaliation:** No discrimination or retaliation is permitted against employees for taking FMLA leave under the new law or for reporting complaints, testifying or instituting proceedings related to the law.
- **Penalties/Remedies:**
 - A violation of the FMLA Expansion is a violation of the FMLA.
 - The penalties include lost wages and benefits, other actual monetary losses, an equivalent amount as liquidated damages, and attorney’s fees and costs.
 - Equitable remedies such as reinstatement are also available.
- **No Social Security Taxes on Wages:** The wages required to be paid during the FMLA leave (after the first ten days) are not taken into account for purposes of determining Social Security taxes owed by the employer.

Pay and Leave for Employees Subject to Multi-Employer Collective Bargaining Agreements

- Signatories to multi-employer collective bargaining agreements (CBAs) may comply with the Emergency Paid Sick Leave Act and FMLA Expansion if: (a) they comply with the applicable CBA; (b) they comply with the applicable bargaining obligations; (c) they make contributions to a multiemployer fund, plan or program based on the paid leave each of employee; and (d) the multiemployer fund pays the employee for leave pursuant to the FMLA Expansion and the Emergency Paid Sick Leave Act.

Paid Sick Leave and Paid FMLA Tax Credits

- **Summary:** Employers will receive a refundable tax credit against the employer share of Social Security taxes equal to 100% of qualified paid sick leave wages paid for each calendar quarter to be paid by the Emergency Paid Sick Leave Act or the FMLA Expansion.
- **Effective date:** The U.S. Secretary of Treasury will determine the effective date, which will be no later than April 2, 2020.
- **No Credits for Government Employers:** The tax credits are not available State or local government employers.
- **Paid Sick Leave Caps:**
 - For employees taking paid emergency sick leave to care for themselves, the amount of wages credited for each employee is capped at \$511 per day.
 - For amounts paid to employees to care for someone else, the amount of wages credited for each employee is capped at \$200 per day.
 - Employers should consult their tax professionals about these caps and additional caps on the credits in the proposed law.

- **Paid FMLA Caps:** The amount of qualified paid FMLA wages taken into account for each employee is also capped at \$200 per day and \$10,000 for all calendar quarters.
- **Refunds:** If the credits exceed the employer's total liability under Section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.
- **No Double Benefits:** To prevent a double benefit, no deduction is allowed for the amount of the credit. In addition, no credit is allowed with respect to paid family leave wages for which a credit is otherwise allowed under the Tax Code.
- **Increase Credit for Health Plan Costs and Medicare Taxes:** The amount of the tax credit has been increased to account for the employer's expenses associated with maintaining group health plan coverage (to the extent excludable from employee income) allocable to the wages for which the tax credit is allowed. It also has been increased to account for the 1.45% Medicare Tax owed on those additional wages.
- **Self-Employed Individuals:** Self-employed individuals will receive similar credits based on what paid sick leave and/or paid FMLA leave they would have received had they been employed by a covered employer.
- **Guidance/Clarification:** The U.S. Secretary of the Treasury is given broad authority to issue regulations and guidance necessary to carry out the tax credits. The Secretary will also determine effective date.

Greater Access to Unemployment Insurance

- \$1 billion will be provided as emergency grants for States, including \$500 million for administrative costs and another \$500 million to be reserved for States that experience unemployment of at least 10%. To receive the reserve amounts, the States must amend their laws to ease unemployment eligibility requirements in like of COVID-19, such as waiting periods or work search requirements.
- 100% federal funding of extended unemployment benefits for qualifying States.
- Interest free loans for States to support unemployment benefits.

Free COVID-19 Testing Under Group Health Plans

- Group health plans must provide free testing for SARS-CoV-2 or the virus that causes COVID-19.
- Group health plans must not charge for products and services needed for diagnostic testing.

Stay tuned as Congress is reportedly working on another round of remedial measures and stimulus to help response to COVID-19.