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## NEW DEVELOPMENTS

### Rapidly Changing FFCRA Guidance & Clarifications 3/23/20

Here is the just-updated summary of the FFCRA, including real life examples from clients so far:

On Friday, the Department of Labor and IRS both posted guidance on applying the Families First Coronavirus Response Act.

This law requires employers with **less than 500 employees** to provide two new forms of paid leave: **Emergency Family Leave and Paid Sick Leave**. These leaves can only be taken for reasons related to the Coronavirus pandemic.

Businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes in order to pay employees for Paid Sick Leave and Emergency Family leave upfront. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. More guidance from the IRS [here](#).

Small business with less than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The DOL has issued guidance on FFCRA [here](#) and will be releasing regulations with a clear standard on this exemption within the next couple of weeks.

The DOL and IRS have both announced a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with FFCRA.

Employers will need to provide Paid Sick Leave and Emergency Family Medical Leave for qualifying coronavirus-related reasons throughout 2020, but not beyond. When trying to figure out how to organize leave plans and prepare for the impact of these new laws, we can help. Do not hesitate to reach out with questions and to utilize our [FFCRA Compliance Package](#).

## **Covered Employers:**

The Families First Coronavirus Response Act applies to all employers with **less than 500** employees, and to public employers of any size.

- **Exceptions:**
  - **Emergency Family Leave:**
    - The Department of Labor is likely to exempt certain health care providers and emergency responders
    - The Department of Labor is **likely to exempt small business with less than 50 employees when the requirement to provide EFL would jeopardize the viability of the business.**
  - **Paid Sick Time:**
    - The Department of Labor is likely to exempt certain health care providers and emergency responders by allowing those employers to opt out of providing paid sick time
    - The Department of Labor is **likely to exempt small business with less than 50 employees when the requirement to provide sick time would jeopardize the viability of the business, but only for the child care or school closure portion of the leave.**

## **Here's an Outline of the Requirements under both of these Leaves:**

### **Emergency Family Medical Leave**

**Eligibility:** Any employee who has worked at least 30 days for a covered employer is eligible for Emergency Family Leave ("EFL").

**Leave Entitlement:** Employees are eligible for up to 12 weeks of leave.

### **When can Employees Take EFL?**

Employees will be able to take up to 12 weeks of Emergency Family Medical Leave if they are unable to work or telework for the following reasons:

- To care for a child (under 18 years of age) of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable due to coronavirus.

If both parents work for the same employer, only one of the parents would be eligible to take this leave to care for the child, as the child would then have a caretaker.

**Wage Payments:** Emergency Family Medical Leave is partially paid by the employer, depending on the length of leave:

- The First 10 days are unpaid. An employee can use any accrued PTO or the Emergency Paid Sick Leave during this time, but cannot be required to do so. The DOL has issued guidance noting that the first 10 days of Emergency Family Leave should be paid through the Emergency Paid Sick Leave portion of FFCRA.

- After those first 10 days, an employer must pay employees at **2/3** their regular hourly rate. You are **NOT** required to pay more than \$200 per day or \$10,000 in total for one employee's leave.

**Notice:** An employer can only request notice for the need for leave "as soon as practicable."

**Job Protection and Reinstatement:** The default FMLA rules apply, meaning that an employer must return the employee to the same or equivalent position upon their return from leave.

- **Exception:** If you have less than 25 employees, and there is an economic downturn that causes changes to your business, and you are no longer able to reinstate the employee, you do not need to. You will still need to use reasonable efforts to place the employee back in a similar position for a 1-year period.

**Hot Topic – Example of Use of EFL:**

A healthy employee has a 2-year old child whose daycare has closed and has been teleworking for the last week. The employee has been juggling caring for their child, while also performing work, not able to give their best to either. This employee does not have another caregiver to care for the child. This employee will be eligible to take Emergency Family Leave:

- The employee elects to use Emergency Paid Sick Leave to be paid for the first 10 days of their Emergency Family. The employee gets paid at 2/3 her regular rate because of that election.
- The employee is paid at 2/3 their regular rate for all days taken for Emergency Family Leave after those first 10 days. The employee elects to use her accrued vacation time to make up the 1/3 difference in pay, so that she continues to receive her regular pay.

If an employee and her spouse have been teleworking and caring for their 5-year old child who is out of school, either the employee or her spouse can elect to use Emergency Family Leave to care for the child who needs a caretaker, while the other can continue teleworking because the child now has a caretaker. In this case, the employee chooses to be the caretaker of the child and take Emergency Family Leave:

- The employee elects not to use any accrued PTO or Emergency Paid Sick Leave for the first 10 days, meaning that the employee will not be paid for that time.
- The employee is paid at 2/3 her regular rate for all days taken for Emergency Family Leave after those first 10 days. The employee does not use any PTO to make up the 1/3 difference in pay.
- At the end of the 12 weeks of Emergency Family Leave, the employee elects to use Paid Sick Leave to continue caring for her child who is still out of school due to the coronavirus outbreak.

In contrast, a healthy employee has a 14-year old child whose school has been closed and the employee has been teleworking for the last week. The employee's child is self-

sufficient and the care for the child does not interfere with the employee's ability to telework. In this situation, the employee would not qualify for Emergency Family Leave because they are still able to work, even though the employee's child does not have another caretaker.

### **Emergency Paid Sick Leave**

**Eligibility:** All current employees who work for a covered employer are eligible. Employers of health care employees or emergency responders can elect to exclude such employees from coverage, if the DOL creates regulations allowing this.

**Leave Entitlement:** Employees are eligible for 2 weeks of paid leave (80 hours for full-time employees, pro-rata based on average hours worked for part-time employees).

### **When Can Employees Take Paid Sick Leave?**

Employees can take paid sick leave when they are unable to work or telework because:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.;
- The employee is self-isolating as ordered by a health care provider because the employee is diagnosed with COVID 19 or to concerns related to COVID-19;
- The employee needs to obtain a medical diagnosis or care if the employee is experiencing the symptoms of COVID 19;
- The employee needs to care for the employee's family member who is subject to a Federal, State or local quarantine or isolation order related to COVID-19 or has been advised to self-quarantine by a healthcare provider for concerns related to COVID-19;
- 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; and
- The employee needs to care for the child of such employee if the school or child care has been closed due to COVID 19, or the child care provider of such son or daughter is unavailable.

**Wage Payments:** An employer must pay employees for Paid Sick Leave at the following rates:

- If an employee takes sick leave for their own sickness or mandated quarantine/isolation, the employee must be paid at their regular rate. You do NOT have to pay the employee more than \$511 per day or \$5,110 in total for this leave.
- If an employee takes sick leave for any other qualifying reason, the employee must be paid at 2/3 their regular rate. You do NOT have to pay the employee more than \$200 per day or \$2,000 in total.

**If you Already have a PTO or Sick Leave Policy:** This leave does not diminish any rights to leave in any other Federal, State, or local law, collective bargaining agreement,

or existing employer policy. An employee may choose to use the paid sick leave under this law prior to use of other leaves.

An employer cannot ask an employee to find a replacement worker when using Paid Sick Leave.

**Retaliation:** Retaliation and discrimination for taking leave under this law is prohibited.

**Obtaining Medical Note or Other Verification:** An employer cannot require a notice for the first day of paid sick leave taken under this law. An employer can require an employee follow reasonable notice procedures in order to continue receiving paid sick time after the first day of leave.

**Notice:** Employers will be required to post notice of this law and its benefits in a conspicuous place in the workplace.

**Hot Topic – Retroactivity and FFCRA:**

A healthy full-time employee has a 2-year old child whose daycare has closed and has been teleworking for the last week. The employee has been juggling caring for their child, while also performing work, not able to give their best to either. This employee does not have another caregiver to care for the child. The employee was given unpaid leave by her employer beginning March 23, 2020. On April 5, the Governor of the employee's state enacts a "stay at home" order for isolation purposes.

This employee will be eligible to take Emergency Family Leave on April 2, 2020:

- The employee will not be eligible for Emergency Family Leave for any leave taken related to childcare before April 2, 2020.
- The employee begins to use Emergency Paid Sick Leave on April 2, in order to be paid for the first 10 days of Emergency Sick Leave, at 2/3's her regular rate.
- On April 5, the employee qualifies for Emergency Sick Leave for her own isolation as ordered by the Government. This means from April 5 – 15 (the employee works 5 days a week), the employee will be paid at her regular hourly rate, because she is taking Emergency Sick Leave for her own isolation. **Note:** Employers should keep in mind state specific orders to isolate. Some states, such as New York, have implemented their own Paid Sick Leave laws to cover absences related to Isolation or Quarantine orders.
- Beginning April 16, the employee has exhausted her 80 hours of Emergency Paid Sick Leave. The employee will revert back to taking Emergency Family Leave at 2/3 her regular rate, so long as her child is still out of daycare.
- The employee elects to use her accrued vacation time to make up the 1/3 difference in pay, so that she continues to receive her regular pay.

**Hot Topic – Differences between Furloughs and Layoffs:** In this trying time, many clients have been reaching out to us about employee layoffs or furloughs. There is a difference between the two:

- **Layoffs:**
  - Layoffs can be temporary or permanent, but when an employee is laid off, the employment relationship has ended. This means that employees will qualify for COBRA immediately and may apply for unemployment.
  - Depending on your state requirements, an employer will have to payout any accrued PTO on separation from employment.
  - Layoffs, even temporary ones, may trigger the WARN Act, which requires employers to give 60 days' notice prior to the layoff, if the layoff
  - If an employee is laid off, you do not have to provide them these paid leaves under FFCRA.
- **Furloughs:**
  - Furloughs are similar to layoffs, but the employment relationship still exists. A furlough is like a mandated unpaid leave of absence, where the employee is expected to come back to work at some point in the future.
  - Employees can still apply for unemployment when they are furloughed.
  - Employees will still have access to their Health Benefits under their Employer's plan. If the furlough continues past a certain point, employees may no longer be eligible for Health Benefits and must be offered COBRA.
  - When an employee is furloughed, they will still be eligible to use these paid leaves under FFCRA, because they have not been separated from employment.

### **How will Employers be Reimbursed or Credited for these Leave Programs?**

Employers will be eligible for a tax credit of 100% of qualified paid sick and family leave wages an employer pays to employees for their payroll taxes. Eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests within 2 weeks.

for the Employer Social Security Contribution tax (Section 3111(a) of IRC) or Excise Tax (3221(a)). If an employer's obligation to pay employees for either of these leave programs exceed their yearly tax contribution to Social Security and Excise Tax, the employer will be able to seek full reimbursement through their taxes. We would advise you to work with your accountant on this issue as it will be fluid.

**Working remotely, with scrubbed hands, we are at full capacity and at the ready. Please do not hesitate to reach out.**

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