

Families First Coronavirus Response Act

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “FFCRA”). The FFCRA seeks to assist employees impacted by COVID-19 and applies to employers with *fewer than 500 employees*. The FFCRA provides for, among other things, (1) one new category of paid FMLA leave related to child care disruption due to the current public health emergency and (2) paid sick time for certain reasons related to COVID-19. These provisions take effect on April 1, 2020 and are scheduled to terminate December 31, 2020. The FFCRA also includes related employer tax credits.

The DOL website recently added a FAQ page and it is an excellent resource for employers seeking to comply with the FFCRA and for employees seeking to understand their rights under the Act. The DOL website will be updated regularly, particularly as the DOL issues regulations related to implementation.

The Emergency Family and Medical Leave Expansion Act (the “FMLA Expansion Act”)

The FFCRA amends the Family and Medical Leave Act of 1993 (the “FMLA”) to provide up to 12 weeks of job protected leave—10 of which are paid, subject to a cap—to employees who have a “qualifying need related to a public health emergency.” This leave can be used by an employee who is unable to work (or telework) due to a need for leave to care the employee’s son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. The FFCRA does not provide leave to an employee who is still able to telework.

The FMLA Expansion Act applies to all employers with fewer than 500 employees. Below are some key aspects related to the new public health emergency leave:

- There is a paid leave requirement for public health emergency leave:
 - The first 10 days of public health emergency leave may be unpaid leave. The employee may elect to substitute paid leave for the public health emergency leave during this time.
 - Following the first 10 days of public health emergency leave, the employer must provide paid leave in an amount that is not less than two-thirds of the employee’s regular rate of pay, calculated based off of the number of hours the employee would otherwise be normally scheduled to work. The FMLA Expansion Act provides a calculation for employees with varying workweek schedules.
 - The mandated pay is capped at \$200 per day and \$10,000 in the aggregate.
- The leave may be used by any employee who has been employed for at least 30 calendar days by the employer (a much lower threshold than for other reasons for FMLA leave). Further, the regular requirement that the employee work at an employment site with 50 employees within a 75-mile radius does not apply in the case of this public health emergency leave.

- For employers with fewer than 25 employees, there is a narrow exception to the FMLA’s job reinstatement requirements. This exception will only apply under specific circumstances.
- While the Department of Labor (“DOL”) has the authority to exempt small businesses with fewer than 50 employees from the public health emergency leave requirements when the imposition of such requirements would jeopardize the viability of the business as a going concern, it is unclear precisely how this may be applied.
- An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from these requirements.

Because the FMLA Expansion Act amends the FMLA by adding a new category of qualifying leave and making adjustments to the existing statute with respect to such leave, employers should remember that language in the FMLA that is not amended—such as prohibitions against discrimination and retaliation—will apply in the case of the new public health emergency leave.

The Emergency Paid Sick Leave Act (the “Emergency Pay Act”)

The Emergency Paid Sick Leave Act creates a requirement for employers with fewer than 500 employees to provide up to 10 days of paid sick leave at the employee’s regular rate of pay to quarantine or seek treatment related to COVID-19. The provisions limit pay to two-thirds of the employee’s regular rate of pay when the leave is to care for a family member or child. Presumably, the reason that the FMLA Expansion Act permits the first 10 days of leave to be unpaid, is due to the sick pay benefits pursuant to the Emergency Pay Act. Below are some key aspects of the Emergency Pay Act:

- An employer must provide paid sick time for any of the following reasons (“Sick Time Leave Reasons”):
 - The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
 - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 - The employee is caring for an individual who is subject to an order as described in the first bullet above or has been advised as described in the second bullet above.
 - 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.
 - 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. An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this reason.

- Full-time employees must be granted 80 hours of paid sick time. Part-time employees must be granted a number of hours equal to the number of hours that such employee works, on average, over a two-week period.
- The rate of pay for sick time shall be not less than the greater of the following: (1) the employee's regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act (the "FLSA"), (2) the minimum wage rate in effect under section 6(a)(1) of the FLSA, and (3) the minimum wage rate in effect for such employee in the applicable State or locality, whichever is greater, in which the employee is employed. However, with respect to any sick time to care for a family member or child, the employee's required compensation only has to be two-thirds of the amount previously described.
- There is a cap on this mandated pay: \$511 per day and \$5,110 in the aggregate when the leave is driven by the employee's own health or need to quarantine; and \$200 per day and \$2,000 in the aggregate when the leave is driven by the employee's need to care for a family member, child out of school, or the "catch all" provision.
- Significantly, this paid sick time must be granted *in addition to* any pre-existing paid leave benefits. Further, the employer may not alter its existing paid leave policy to avoid this provision.
- The paid sick time must be made available for immediate use by an impacted employee, regardless of the length of such employee's employment. Moreover, the employer cannot require that any employee first exhaust other paid leave benefits.
- The paid sick leave shall not carry over from one year to the next.
- Employers must post a notice of the paid sick time requirements. The Secretary of Labor will draft a model notice that can be used.
- This Emergency Pay Act creates a discrimination claim, providing that "it shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—(1) takes leave in accordance with this Emergency Pay Act; and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Emergency Pay Act (including a proceeding that seeks enforcement of this Emergency Pay Act), or has testified or is about to testify in any such proceeding."
- An employer who violates the Emergency Pay Act will be considered to have failed to pay minimum wages in violation of the FLSA and subject to the penalties in the FLSA.
- While the Department of Labor has the authority to exempt small businesses with fewer than 50 employees from the public health emergency leave requirements when the imposition of such requirements would jeopardize the viability of the business as a going concern, it is unclear precisely how this may be applied.

*If an employer closes a worksite before April 1, 2020, then employees are not eligible for paid sick leave or expanded family and medical leave. From the DOL website, Q&A no. 23:

If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. It should be noted, however, that if your employer is paying you pursuant to a paid leave policy or State or local requirements, you are not eligible for unemployment insurance.

The same rule applies if an employer closes on or after April 1, 2020. See Q&A no. 24.

If an employer is open but furloughs some employees because it does not have enough work or business for those employees, the furloughed employees are not entitled to paid sick leave or expanded family and medical leave.

Tax Credits for Paid Sick and Paid Family and Medical Leave

The FFCRA provides employers certain tax credits with respect to payments required under the new law, with limitations mirroring those described above. The paid sick time payroll tax credit can be claimed on a quarterly basis, equal to 100 percent of the amount of sick leave wages paid. This credit is limited to \$511 per day (\$5,110 total) if an employee is taking time off to care for himself or herself (see generally the first three bullet points under Sick Time Leave Reasons, above) or \$200 per day (\$2,000 total) if the sick leave is to care for an individual who is quarantined or showing symptoms of COVID-19 or a minor child whose school is closed. Similarly, for wages paid during a FMLA public health emergency leave, a separate payroll tax provision allows a 100 percent credit against the employer's share of the payroll tax for each employee, limited to \$200 per day (\$10,000 per employee total). In each case, the credits are refundable if it exceeds the amount the employer owes in payroll tax. The FFCRA does not provide a payroll tax cut or an extension to standard filing deadlines for federal tax returns, though the Internal Revenue Service separately had extended the April 15th deadline for tax payments (not filing) by 90 days.