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Families First Coronavirus Response Act

On March 14, 2020, the House of Representatives passed H.R. 6201, the Families First Coronavirus Response Act (“FFCRA”). On March 18, 2020, the Senate passed the FFCRA, and President Trump signed it into law.

The FFCRA provides for two primary leave items that affect employers:

1. Establishes Emergency Paid Sick Leave
2. Establishes Public Health Emergency Leave under the FMLA

The FFCRA is effective April 1, 2020, and the FFCRA and all of its requirements expire on December 31, 2020. In order to be compliant with the FFCRA which takes effect April 1, 2020, we strongly encourage employers to begin taking necessary steps to prepare now and seek legal counsel to assist as needed.

The Secretary of Labor has been authorized to issue regulations and guidelines. We will continue to monitor those developments. In the meantime, the Department of Labor (DOL) has issued some informal guidance on the FFCRA.^[1] The DOL has also issued Field Assistance Bulletin 2020-1: Temporary Non-Enforcement Period Applicable to the Families First Coronavirus Response Act, which provides guidance to Wage and Hour Division staff regarding the temporary non-enforcement (in some cases) of the FFCRA. Finally, the DOL has posted a model FFCRA notice, and information about the notice.^[2]

This memorandum has been updated as of March 25, 2020, to include that additional information.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Within the FFCRA, the Emergency Family and Medical Leave Expansion Act temporarily amends the Family Medical Leave Act (“FMLA”) by adding “a qualifying need related to a public health emergency” to the reasons that an eligible employee would be entitled to take FMLA leave.

Does the new law affect any existing terms of the FMLA?

No, the existing qualifying reasons for taking FMLA (e.g. serious health condition, military caregiver, baby bonding) are not affected by the new law. However, for just the new “qualifying need related to a public health emergency,” the law establishes some new and different

terms compared to the existing FMLA.

How long will the new law be in effect?

The law provides that “public health emergency” will no longer be a qualifying reason after December 31, 2020.

Which employers will be subject to the new law?

The new law applies to private sector entities employing fewer than 500 employees and to all public sector employers. According to the DOL, the calculation of employees for private sector entities is based on the number of employees at the time the employee’s leave is to be taken. In making this determination, private sector employers should count all full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States.

Included in the employee count are employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer’s payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm, if there is a continuing employment relationship).

The Secretary of Labor has authorization to issue regulations to exempt small businesses with fewer than 50 employees if the requirements would “jeopardize the viability of the business as a going concern.” Employers wishing to take advantage of this small business exemption should document why the business meets the criteria that will be addressed in forthcoming regulations. We note that the Department of Labor has directed that employers should not submit their documentation to the DOL for review. The DOL has confirmed that criteria for this exemption will be included in the now-pending regulations.

Which of their employees are eligible for leave under the new law?

Employees are eligible after 30 days of employment, regardless of the number of individuals employed at their worksite or geographic region.

An employee has been employed for at least 30 calendar days if the employee was on payroll for the 30 calendar days immediately prior to the day the employee’s leave would begin. For example, an employee requesting leave on April 1, 2020, would need to have been on payroll as of March 2, 2020.

Time spent working as a temporary employee for the same employer counts toward the eligibility period if the employer subsequently hires the employee on a full-time basis.

Are any categories of employees excluded from eligibility under the new law?

The law does not exclude any categories of employees automatically. However, if the employee is a “health care provider” or an “emergency responder,” the employer may choose to exclude the employee from eligibility for emergency paid sick time. In addition, the law authorizes the Secretary of Labor to issue regulations to exclude “certain health care providers and emergency responders” from eligibility. No such regulations have issued as of the time of this update.

What are the new qualifying reasons for eligible employees to take leave under the new law?

As defined, a “qualifying need related to a public health emergency” means any one of the following:

- The employee is unable to work (or telework) due to a need to care for the employee’s son or daughter because the son or daughter’s elementary or secondary school or place of care has been closed due to a public health emergency;
- The employee is unable to work (or telework) due to a need to care for the employee’s son or daughter because their child care provider is unavailable, due to a public health emergency.”

Does the law change any of the definitions (such as “health care provider,” “parent,” etc.) under the existing FMLA?

No, the law does not change the definitions as they apply to existing qualifying reasons under the FMLA.

Is the leave paid or unpaid?[3]

The first 10 days of public health emergency FMLA leave may be unpaid. After that, the employer shall provide paid leave in an amount that is not less than 2/3 the employee’s regular rate of pay (as defined by the FLSA) and based on the number of hours the employee would otherwise be normally scheduled to work. However, in no event, may the compensation for the paid leave exceed \$200 per day or \$10,000 total.

The DOL has confirmed that scheduled overtime hours should be included in the total hours on which the regular rate of pay is based.

However, pay for leave taken during scheduled overtime hours need not be compensated at a premium rate.

The DOL has also confirmed that an employee who is taking public health emergency FMLA leave may use emergency paid sick leave for the first 10 days, which are otherwise unpaid. The employee may instead choose to substitute any accrued vacation, personal leave, or other medical/sick leave for unpaid leave. The DOL also stated in its guidance that an employee who is eligible for both public health emergency FMLA leave and paid emergency sick leave (discussed below), is entitled to no more than a combined total of 12 weeks of paid leave.

How do employers calculate the amount of leave to give to employees with varying schedules?

If the employee's schedule varies from week to week in such a way that the employer cannot determine with certainty the number of hours that the employee would have worked, then the employer should use one of the two following calculations:

1. A number equal to the average number of hours that the employee was scheduled per day (including any leave taken by the employee) over the six-month period ending on the date on which the employee begins the public health emergency FMLA leave.
2. If the employee did not work over a six-month period, then the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

Similarly, for part-time employees, the DOL explained that employers must calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours.

If a part-time employee has not been employed for at least six months, then you must use the number of hours that you and your employee agreed that the employee would work upon hiring. If there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Is the public health emergency FMLA leave applied retroactively to leave taken before April 1, 2020?

The DOL has stated that public health emergency FMLA leave does not apply retroactively.

Are employees required to give notice of their need for public health emergency FMLA leave?

When the need for public health emergency FMLA leave is foreseeable, the employee shall provide notice to the employer as soon as is practicable.

What are the requirements regarding reinstatement?

The only change to the general right to reinstatement under the existing FMLA is to allow for an exemption for the employee of an entity with fewer than 25 employees if the employee's position no longer exists 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 leave. In the event that this occurs, the employer must make reasonable efforts to restore the employee to an equivalent position. If that is not possible, the employer must make reasonable efforts for one year after the earlier of the date on which the qualifying need related to a public health emergency concludes, or 12 weeks after the commencement of the employee's leave.

There is nothing on the face of the FFCRA that limits the application of this section to only private employers. Unless regulations state otherwise, this exception would apply to public employers with fewer than 25 employees.

Does public health emergency FMLA leave run concurrently with CFRA leave?

No changes have been made to the California Family Rights Act (CFRA) at this time. Employees who take public health emergency FMLA leave could also be designated on CFRA leave, so long as the reason for public health emergency FMLA leave is also a qualifying reason for CFRA leave, and employees meet the existing eligibility requirements for CFRA leave.

EMERGENCY PAID SICK LEAVE

Which employers are covered by the FFCRA?

For purposes of emergency paid sick leave, "employer" includes any private employer who employs fewer than 500 employees, and any public agency that employs one or more employees. According to the DOL, the number of employees for private sector entities is based on the count at the time the employee's leave is to be taken. In making this determination, private sector employers should count all full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. Included in the count are employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's

payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship).

The Secretary of Labor has authority to exempt small businesses with fewer than 50 employees when the requirements “would jeopardize the viability of the business as a going concern...” Employers wishing to take advantage of this small business exemption should document why the business meets the criteria that will be addressed in forthcoming regulations. We note that the Department of Labor has directed that employers should not submit their documentation to the DOL for review. The DOL has confirmed that criteria for this exemption will be included in the now-pending regulations.

Which employees are eligible for emergency paid sick leave?

Employees are eligible for emergency paid sick leave, regardless of how long the employee has been employed by the employer.

Are any employees excluded from coverage?

The law does not exclude any categories of employees automatically. However, if the employee is a “health care provider” or an “emergency responder,” the employer may choose to exclude the employee from eligibility for emergency paid sick time. In addition, the law authorizes the Secretary of Labor to issue regulations to exclude “certain health care providers and emergency responders” from eligibility. No such regulations have issued as of the time of this update.

How does emergency paid sick leave affect other employer-provided paid leave?

The employee may choose whether to use emergency paid sick leave prior to using any other paid leaves. The employer may not require that an employee use other paid leave before using emergency paid sick leave.

It was somewhat unclear on the face of the statute whether Congress intended to establish the emergency paid sick leave as its own separate bank of leave, in addition to leave already provided by the employer, or if the employer could mandate that it run concurrently with other employer-provided sick leave. With the latest guidance, the DOL has not yet addressed this question head-on, but has stated that because the leave is a “new leave requirement,” an employer could not deny use of emergency paid sick leave because it had allowed use of paid sick time “for a reason identified in the Emergency Paid Sick Leave Act” before the FFCRA takes effect. While waiting to see if forthcoming regulations will address this, the more conservative approach would be to treat it as a separate bank of leave. We also

recommend that employers begin internal factfinding to consider the potential logistics of implementing both approaches.

What are the reasons an employee could take emergency paid sick leave?

Employers are required to provide paid sick time to an employee who 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 a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for the employee's son or daughter because that child's school or place of care has been closed or the child care provider is unavailable due to COVID-19 precautions.
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.

This last criterion has not yet been established; we will continue to monitor and update regarding further developments.

The terms "son or daughter" and "health care provider" have the same meanings as in the existing FMLA.

The employer may not require that the employee find a replacement employee for them during their time off.

How much emergency paid sick leave are employees eligible to take under the FFCRA?

Full-time employees may take up to 80 hours of emergency paid sick leave. Part-time employees may take up to a number of hours equal to the number of hours that the employee works, on average, over a two-week period.

The DOL has explained that if the normal hours scheduled for part-time employees are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours.

If a part-time employee has not been employed for at least six months, then you use the number of hours that you and your employee agreed that the employee would work upon hiring. If there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

If the employee requires fewer than 80 hours of emergency paid sick leave, the leave will end upon the start of the employee's next scheduled work shift.

The DOL also clarified that emergency paid sick leave requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid as emergency paid sick leave is capped at 80.

Neither the FFCRA nor the guidance issued so far addresses whether this time can be taken intermittently.

Emergency paid sick leave does not carry over from one year to the next. Further, according to the DOL guidance, employees cannot take emergency paid sick leave for additional reasons once the 80-hour cap has been met.

How do employers calculate how much to pay employees for emergency paid sick leave?

An employee taking leave must be compensated at their "regular rate of pay" as determined by the FLSA, for the employee's regularly scheduled hours, including regularly scheduled overtime hours. The DOL has stated that pay for leave taken during overtime hours need not be provided at a premium rate.

While the employee should be paid their regular rate of pay, compensation for emergency paid sick time shall not exceed \$511 per day and \$5,110 in total when emergency paid sick leave is taken for reasons 1, 2, and 3 above. Compensation for emergency paid sick time shall not exceed \$200 per day and \$2000 in total when it is taken for reasons 4, 5, and 6 above. The cap for reasons 4, 5, and 6 appears to be lower because the law specifies that the compensation for employees taking leave for those reasons shall be two-thirds of the amount of compensation for leave taken for reasons 1, 2, and 3.

Is the emergency paid sick leave applied retroactively?

The DOL has stated that emergency paid sick leave does not apply retroactively. Further, as noted above, the DOL made clear that employers cannot deny an employee use of emergency paid sick

leave because the employer provided the employee with paid leave for a reason covered by emergency paid sick leave before April 1, 2020.

Is there any right to compensation for unused emergency paid sick leave?

There is no right to compensation for unused emergency paid sick leave upon the employee's termination, resignation, retirement, or other separation from employment.

Are there any notices that employers are required to post?

Employers are required to post and keep posted, in conspicuous places where notices to employees are normally posted, a notice that will be prepared by the Secretary of Labor (more information on the required notice is set forth below).

What are the penalties that employers could face for discrimination, retaliation, or non-compliance?

Employers are prohibited from discharging, disciplining, or in any other manner, discriminating against an employee who takes leave under the FFCRA or who files a complaint, institutes any proceeding related to the FFCRA, or testifies or is about to testify in any such proceeding. An employer who willfully violates this provision will be considered in violation of Section 15(a)(3) of the Fair Labor Standards Act (29 U.S.C. 215(a)(3)), and be subjected to the penalties in Sections 16 and 17 of the FLSA (29 U.S.C 216, 217).

An employer who fails to provide emergency paid sick leave will be considered to have failed to pay minimum wages in violation of section 6 of the FLSA (29 U.S.C. 206) and will be subjected to the penalties in Sections 16 and 17 of the FLSA (29 U.S.C 216, 217).

ENFORCEMENT

Will DOL be bringing enforcement actions for all violations as soon as the FFCRA takes effect?

No, not for all violations. In an Enforcement Guidance issued on March 24, 2020, the DOL announced that there will be a "temporary non-enforcement period" for violations by an employer who demonstrates "reasonable, good faith efforts" to comply with the FFCRA.

How long is the "temporary non-enforcement period"?

The "temporary non-enforcement period" runs from March 18, 2020, through April 17, 2020.

How does an employer demonstrate "reasonable, good faith

efforts” to comply with the FFCRA?

The standard assumes that an employer has violated some provision of the FFCRA and the violation has been brought to the employer’s attention by either the DOL, the employee seeking payment, or representative of an employee seeking payment.

To begin with, the employer must be able to show that its violation of the act was not “willful,” meaning that the employer did not know that its conduct violated the FFCRA or acted with “reckless disregard” as to whether or not its conduct was prohibited.

Once notified of the violation, the employer must take two steps:

1. Remedy any violations, including by making all affected employees whole as soon as practicable.
2. Provide a written commitment to the DOL that the employer will comply with the FFCRA in the future.

Are there violations for which the DOL may take enforcement action before April 17, 2020?

Yes. The DOL emphasized that it reserves the right to take enforcement action if a violation is “willful,” or if the employer does not take both of the required steps following notice of a non-“willful” violation.

What happens after April 17, 2020?

The DOL has stated that it will then “fully enforce violations of the Act, as appropriate and consistent with the law.”

MODEL NOTICE TO EMPLOYEES

Where do employers post the notice?

The notice should be posted in a conspicuous place on employer premises. The DOL also states that employers can satisfy the requirement by emailing or mailing the notice to current employees, or posting it on an employee information website. If employees are teleworking, make sure it is sent to them. Employers should also make sure that new employees are provided with the notice.

Does the notice have to be posted in other languages that employees speak?

Employers are not required to post in other languages, but the DOL is working to provide it in other languages. Certainly, if you have non-English-speaking employees, posting it in other languages would be a best practice.

Where can employers find updated versions of the notice?

Employers can check for updated versions of the notice at www.dol.gov/agencies/whd.

TAX CREDITS[4]

Are there mechanisms in place to help employers pay for the new mandated paid leaves?

The FFCRA also provides for new tax credits to eligible employers to offset new costs associated with public health emergency FMLA leave and with emergency paid sick leave. The tax credits are allowed against the employer portion of Social Security taxes. The refundable tax credit is equal to 100% of the qualified emergency paid sick leave paid as required by the law in each calendar quarter. Similarly, eligible employers are also entitled to a refundable tax credit equal to 100% of the qualified public health emergency FMLA leave as required by the law.

Paid leave offered in addition to the legal mandated leave does not qualify for the tax credits.

Do these tax credits apply to government employers?

The sections of the FFCRA that provide for tax credit-based relief include the following statement regarding the availability of the benefit to certain governmental employers:

This credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.

As such, these tax credits are not available to local public agencies, many of whom have not opted into Social Security.

[1] There are three publications that the DOL has issued: Questions and Answers, Employee Paid Leave Rights, and Employer Paid Leave Requirements. Those publications are available here: <https://www.dol.gov/agencies/whd/pandemic>. In addition, the DOL has issued Field Assistance Bulletin 2020-1, with subject “Temporary Non-Enforcement Period Applicable to the Families

First Coronavirus Response Act (FFCRA), which is available at: <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2020-1.pdf>.

[2] The model poster is available here: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

[3] Please note, the requirements for paid leave apply only to public

health emergency FMLA leave under the FFCRA, and not to any other type of FMLA leave.

[4] A brief release regarding the tax credits for eligible employers is available here:

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>