



A Robinson+Cole Legal Update

Coronavirus (COVID-19)

March 31, 2020

Paid Sick and Family Leave Legislation in Response to Coronavirus

Please note that this summary has been updated to reflect guidance issued by the U.S. Department of Labor (DOL) on March 29, 2020. The recent guidance defines the health care provider and emergency responder exemptions, as well as the exemption for employers that employ 50 or fewer employees and would suffer significant business impacts as a result of providing paid leave under the FFCRA. The guidance also provides the DOL's position concerning the scope of the terms "son or daughter" for purposes of taking leave to care for a child. **While we actively review guidance as it is issued, the DOL is releasing additional guidance on a regular basis. Therefore, to the extent you have questions about how any of the provisions of the FFCRA, CARES Act, or related guidance may affect your business, we urge you to contact competent legal counsel.**

As the novel coronavirus (COVID-19) continues to sweep the nation, the "Families First Coronavirus Response Act" (FFCRA) was approved by Congress and signed into law by the President on March 18, 2020, in an attempt to respond to myriad economic and other challenges faced by the United States during this global pandemic. Subsequent to the enactment of the FFCRA, the President signed into law on March 27, 2020, the "Coronavirus Aid, Relief, and Economic Security Act" (CARES Act), which amended certain provisions of the FFCRA (collectively referred to as the "Legislation"). In addition, the Internal Revenue Service (IRS) and DOL have issued some guidance with respect to the provisions of FFCRA, prior to amendment by the CARES Act.

Several of the Legislation's provisions will affect employers navigating the unstable business landscape as well as their employees, who are also impacted by the COVID-19 outbreak. The Legislation, in part, implements changes to the federal Family and Medical Leave Act (FMLA) that establishes a federal emergency paid leave benefits program to provide payments to employees taking leave due to the COVID-19 outbreak, requires employers to provide paid sick time leave, permits tax credits for amounts paid to employees on leave, and allows for additional funding to state unemployment insurance trust funds.

The FFCRA takes effect on April 1, 2020, and most provisions will expire on December 31, 2020. The emergency family and medical leave and emergency paid sick leave provisions will not apply retroactively, and do not apply in cases in which an employer closes its worksite for lack of business or because the employer was required to close pursuant to a federal, state or local directive (either before or after April 1, 2020). The changes made to the FFCRA by the CARES Act take effect on the date of enactment of the CARES Act.

Emergency Family and Medical Leave Expansion Act

- **Covered Employers** – Generally, private-sector employers with fewer than 500 full-time and part-time employees within the United States at the time the employee's leave is to be taken will be subject to these changes. For purposes of determining whether an employer has 500 or fewer employees in the United States at the time the employee is requesting leave, the employer shall include any employees who already are on leave, as well as certain employees who are jointly

employed or working for the employer under an agreement with a temporary agency. Independent contractors are not included.

- **Eligible Employees** – All employees of an employer (except those meeting the definition of "health care provider" or "emergency responder" as described below) are covered so long as the employee has worked for the employer for at least 30 calendar days, regardless of whether the employee is full-time or part-time. A rehired employee of an employer may be eligible in situations in which the employee 1) was laid off by the employer not earlier than March 1, 2020, 2) had worked for the employer for not less than 30 of the last 60 calendar days prior to the employee's layoff, and 3) was rehired by the employer.
- **Reasons to Take Leave** – An employee is eligible for leave if the leave is due to a "qualifying need related to a public health emergency," which means the employee is unable to work (or telework) due to the need to care for a child if the child's school, place of care, or child care provider is closed due to a public health emergency (including coronavirus). **Please note** that while the original provisions of the FFCRA stated that leave may only be taken to provide care for a child under the age of 18, recently issued U.S. Department of Labor guidance states that leave may be taken for a son or daughter over the age of 18 if that individual is incapable of self-care due to a physical or mental disability.
- **Recordkeeping Requirements** – Employers must require that employees requesting leave provide documentation of the need for leave just as the employer normally would with conventional FMLA requests. Documentation may include a notice posted on a government, school, or daycare website, newspaper publications, or an email from the school or provider regarding a closure. This documentation must be retained in the employer's records in order to be eligible to receive the tax credit (described below).
- **Leave Amount** – As is the case under the current FMLA law, eligible employees will be eligible to take up to 12 weeks of leave under certain qualifying circumstances. The first 10 days may consist of unpaid leave, but the remainder of the leave must be paid. An employee may elect to use any emergency paid sick leave for which he or she is eligible for the first 10 days of the leave period. An employer may permit an employee to take leave intermittently.
- **Use of Other Accrued Leave** – Employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the initial 10 days of unpaid leave, but an employer may not require an employee to substitute any such leave.
- **Salary Continuation and Health Insurance Benefits** – Employers must pay employees for each day the employee is out of work after the initial 10-day period for the remainder of the leave period, up to certain dollar limits. Employees must be paid no less than two-thirds of their regular rate of pay based on the number of hours the employee would otherwise have been scheduled to work, including overtime hours (but pay does not need to include a premium for overtime hours). However, amounts paid to an employee do not have to exceed \$200 per day, or \$10,000 in the aggregate.

If an employee's schedule varies from week to week and the employer cannot determine with reasonable certainty the number of hours the employee would have worked had they not taken leave, the employer must determine the employee's hours by averaging the number of hours the employee was scheduled per day for the 6-month period immediately prior to the employee's leave (including any paid time off the employee took during that 6-month period). If the employee did not work during the 6-month period immediately preceding the employee's leave, the employer shall use the expected number of hours per day that the employee would work as determined at the time of hiring.

Employees are eligible to continue their group health insurance during leave under the same terms as if the employee continued to work.

- **Job Protection** – As with the traditional FMLA leave provisions, public health emergency leave is also job-protected. However, the Legislation provides an exemption from this requirement for employers with fewer than 25 employees when the employee's position no longer exists due to economic conditions or other changes in the employer's operating conditions. For this exemption to apply, the following conditions must be satisfied:
 - the employee takes public health emergency leave;
 - the employee's position at the commencement of leave no longer exists due to economic conditions or other changes in the employer's operating conditions that:
 - affect employment; and
 - are caused by a public health emergency during the leave period;

- the employer makes reasonable efforts to restore the employee to a position equivalent to one they held when leave commenced; and
- the employer makes reasonable efforts to contact the employee if an equivalent position becomes available.

Emergency Paid Sick Leave Act

- **Covered Employers** – Private-sector employers with fewer than 500 employees and certain public agencies employing one or more individuals are subject to these provisions.
- **Eligible Employees** – All employees are covered, regardless of how long they have been employed by the employer. Employers that employ health care providers or emergency responders may exclude those employees (see below for additional information relating to this exemption).
- **Reasons to Take Leave** – An employee is eligible for leave if the employee is unable to work (or telework) due to the employee:
 - being subject to federal, state, or local quarantine or isolation;
 - being told by a health care provider to self-quarantine;
 - having symptoms and seeking a medical diagnosis;
 - having to care for an individual subject to a federal, state, or local quarantine or isolation;
 - having to care for a child of any age if the child's school, place of care, or child care provider is closed due to the public health emergency; or
 - a substantially similar condition as may be further specified by the Department of Health and Human Services (HHS).
- **Recordkeeping Requirements** – An employer must require an employee taking leave to provide the employer with documentation supporting the reason for leave, including 1) the employee's name, 2) qualifying reason for leave, 3) statement that the employee is unable to work (or telework) due to that reason, and 4) the dates for which leave is requested.
- The employer must also request documentation of the reason for leave (e.g., any quarantine or isolation order applicable to the employee, written documentation from a health care provider advising the employee to self-quarantine, or notice of school closure). This documentation must be retained in the employer's records in order to be eligible to receive the tax credit (described below).
- **Leave Amount, Pay, and Health Insurance** – Full-time employees are eligible to take up to 80 hours of emergency paid sick leave, and part-time employees are eligible to take leave in the amount of the employee's average number of hours worked in a two-week period. Both full-time and part-time employees must take leave over a two-week period. If the leave is taken by the employee for their own care, the employee shall be paid the greater of 1) their regular rate of pay for the hours the employee was normally scheduled to work, including overtime hours (but pay does not need to include a premium for overtime hours), 2) the federal minimum wage in effect under the Fair Labor Standards Act (FLSA), or 3) the applicable state or local minimum wage. If the leave is taken to care for a family member of the employee, the employee shall be paid at two-thirds of the greater of 1) their regular rate of pay for the hours the employee was normally scheduled to work, including overtime hours (but pay does not need to include a premium for overtime hours), 2) the federal minimum wage in effect under the FLSA, or 3) the applicable state or local minimum wage.

If an employee takes leave due to 1) a federal, state, or local quarantine or isolation; 2) a recommended self-quarantine by a health care provider; or 3) the employee experiencing symptoms of coronavirus and seeking a diagnosis, then paid leave to the employee does not have to exceed \$511 per day or \$5,110 in the aggregate. If an employee takes leave as a result of 1) caring for an individual that is subject to federal, state, or local quarantine; 2) caring for a child of any age if the child's school or care facility is closed due to the public health emergency; or 3) a substantially similar condition specified by HHS, then paid leave to the employee does not have to exceed \$200 per day or \$2,000 in the aggregate.

If an employee is teleworking or the employee is working at their usual worksite, but requests leave to care for a child due to the child's school or place of care being closed, an employer may permit the employee to take leave intermittently. If an employee is working at their usual worksite and requests leave for any other qualifying reason, the employee must take their leave consecutively until the employee either exhausts their leave amount or no longer has a qualifying reason for leave.

Employees are eligible to continue to their group health insurance during leave under the same terms as if the employee continued to work.

- **Cap on Sick Leave** – The total number of hours for which an employee may receive emergency paid sick leave is capped at 80 hours for any combination of qualifying leave reasons. In other words, an employee may not take 80 hours of paid sick leave for one qualifying reason and then another amount of paid sick leave for another qualifying reason.
- **Use with Other Paid Leave** – An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses emergency paid sick leave.
- **Notice** – Employers must post a notice regarding employee's rights under the law. The Department of Labor has released a model notice, which is available [here](#). The model notice is also available in Spanish [here](#). An employer that has a workforce that is primarily teleworking may satisfy this posting requirement by emailing or directly mailing the notice to its employee, or by posting this notice on an employee internal or external website.
- **Carry Over** – This sick leave cannot be carried over from one year to the next.

Exemptions - Health Care Providers, Emergency Responders, and Employers with 50 or Fewer Employees

Health Care Providers and Emergency Responders

For purposes of both the emergency paid family leave and emergency paid sick leave provisions under the FFCRA, an employer may exempt "health care providers" and "emergency responders" from FFCRA paid leave provisions. According to the DOL's guidance, whether an employee meets one of the exemptions is to be determined on a case-by-case basis, and the exemption of employees does not mean the entire organization is also exempt. The DOL also urges employers to apply the exemptions judiciously when determining which of their employees are exempt from coverage under the FFCRA to minimize the spread of the virus.

- **Health Care Providers** – Individuals employed at any of the following locations:
 - a doctor's office;
 - hospital;
 - health care center;
 - clinic;
 - post-secondary educational institution offering health care instruction;
 - medical school;
 - local health department or agency;
 - nursing facility;
 - retirement facility;
 - nursing home;
 - home health care provider;
 - any facility that performs laboratory or medical testing;
 - pharmacies;
 - or any similar institution, facility, location, or site where medical services are provided similar to the above.

Additionally, those individuals that contract with any of the institutions, employers, or entities listed above to provide services or to maintain the operation of the facility may also be exempt.

- **Emergency Responders** – Individuals employed in one of the following capacities:
 - military or national guard;
 - law enforcement officers;
 - correctional institution personnel;
 - fire fighters;
 - emergency medical services personnel;
 - physicians;
 - nurses;
 - public health personnel;
 - emergency medical technicians;
 - paramedics;

- emergency management personnel;
- 9-1-1 operators;
- public works personnel;
- persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

Employers With 50 or Fewer Employees

Separate from the "health care providers" and "emergency responders" exemptions, employers with 50 or less employees may claim an exemption from certain of FFCRA's paid leave requirements if compliance with the FFCRA would jeopardize the viability of the business as a going concern. This exemption applies only to the paid sick leave law and expanded FMLA related to child care issues arising because a school or place of care has closed due to COVID-19. Employers meeting this exemption must still provide for leave under the FFCRA for other qualifying leave reasons.

Employers may claim this exemption if an authorized officer of the business has determined that any of the following factors apply:

- payment of leave under the FFCRA would result in the employer's expenses and financial obligations to exceed business revenues, causing the employer to cease operating at a minimal capacity;
- the absence of an employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the employer due to the employee's specialized skills, knowledge of the business, or responsibilities; **or**
- there is an insufficient number of workers able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services that are needed for the employer to operate at minimal capacity.

Tax Credits for Paid Sick and Paid Family and Medical Leave

The Legislation also provides employers that pay employees pursuant to the requirements under the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act with a payroll tax credit to cover 100 percent of the wages paid to employees, up to certain limitations. Specifically, qualified paid sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter. The qualified emergency family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter.

Additionally, the payroll tax credit for those employers that sponsor group health plans may be increased by the amount of "qualified health plan expenses" excluded from an employee's gross income and that are allocable to qualified sick leave wages or qualified family leave wages in accordance with regulations to be prescribed by the Department of Treasury at a future date. For purposes of this Legislation, a "group health plan" means a plan maintained by an employer to provide for health care to employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families. A "qualified health plan expense" is an amount paid or incurred by the employer to provide and maintain the group health plan.

Employers may receive advances on anticipated payroll tax credits rather than waiting to be reimbursed on the back end and, should an employer fail to deposit its payroll taxes in anticipation of such tax credits, any associated penalties may be waived. Pursuant to IRS Information Release 2020-57, eligible employers that pay qualifying emergency family leave and/or emergency paid sick leave wages to employees will be able to claim the payroll tax credit by retaining an amount of both the employer's share of payroll taxes and the employee's share of payroll taxes equal to the amount of qualifying emergency family leave and/or emergency paid sick leave wages that they paid, rather than depositing them with the IRS.

Emergency Unemployment Insurance Stabilization and Access Act of 2020

- **Emergency Grants** – States may receive emergency grants, which will provide additional funding in the Unemployment Trust Fund for states to use in the processing and payment of unemployment insurance benefits.

- **Conditions** – To receive such grants, *states must satisfy several conditions*. One condition for receipt of such grants is that states must require employers to provide notification of potential unemployment insurance eligibility to laid off workers.

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