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COVID-19 Update: President signs Families First Coronavirus Response Act

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Late in the evening on March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) into law. The FFCRA takes effect on April 2, 2020, and the paid family leave and paid sick leave provisions will sunset and expire on December 31, 2020.

Generally, the FFCRA requires covered employers to provide paid family leave and paid sick leave to employees who are unable to work (or telework) because of COVID-19 (coronavirus). The legislation also provides federal funding for state unemployment insurance benefits, as well as tax credits for private sector employers.

The FFCRA does not address whether employees are eligible if an employer makes temporary layoffs or furloughs. In that event, employees will be eligible for unemployment benefits if they are unable to work due to COVID-19-related circumstances.

Highlights of the FFCRA are below.

Covered employers

Unlike the Family and Medical Leave Act (FMLA), which generally applies to employers with 50 or more employees, the FFCRA requires all public and private employers with



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fewer than 500 employees to provide emergency paid family leave. It also requires private sector employers with fewer than 500 employees, government employers and all other non-private entity employers with more than one employee to provide eligible employees with paid sick leave. The FFCRA directs the Department of Labor (DOL) to issue regulations creating exemptions for businesses with under 50 employees if providing either of these benefits would jeopardize the viability of the employer. These regulations have not been promulgated at this time.

In addition, employers of health care providers and emergency responders can elect not to provide emergency paid family leave or emergency paid sick leave to these two groups of employees. The DOL is directed to issue regulations as to how to exempt these two groups of workers.

Emergency paid family leave

The first component of the FFCRA requires covered employers to provide 12 weeks of protected leave^[1] to employees who are unable to work (or telework) because they need to stay home to care for a child under age 18 whose school or childcare provider is closed or unavailable due to COVID-19. Eligible employees for purposes of the emergency paid family leave are those who have worked for the employer for at least 30 calendar days.

Eligible employees do not receive any pay under this program during the first two weeks of leave but may use other applicable paid time off (PTO) benefits, including employer-provided benefits or, if eligible, the paid sick leave established by the FFCRA. Employers must pay employees during the remaining 10 weeks at an amount not less than two-thirds of the employee's regular rate of pay, with caps of \$200 per day or \$10,000 in the aggregate.

The normal guarantee of FMLA job restoration following the use of paid emergency leave is modified. For employers with fewer than 25 employees, job restoration will not be required if the position no longer exists due to the effects of the public health emergency, even after reasonable efforts by the employer to restore the employee. In such a case, the employee is to be placed on a contact list for one year. During that year, the employer must make reasonable efforts to contact the employee if an equivalent position becomes available. The normal guarantee of job restoration following use of paid emergency leave still applies for employers with 25 or more employees.

Emergency paid sick leave

The second component of the FFCRA enacts a new paid sick leave program, which requires all covered employers to provide 14 days of paid sick leave to eligible employees. Unlike the paid family leave provision, there is no requirement that the employee has worked for any specific amount of time to be eligible.

This paid sick leave benefit entitles full-time employees to 80 hours of pay at the rates identified below, while part-time employees are entitled to the number of

hours at the rates identified below that such employee works on average over a two-week period (e.g., if the employee works 20 hours per week, 40 total hours of paid sick leave).

An employee may only qualify for the paid sick leave aspect for one of the following reasons:

1. To self-isolate because the employee is diagnosed with COVID-19. In this case, the employee is to be paid at their full rate, up to \$511 per day and \$5,110 in the aggregate.
2. To obtain a medical diagnosis upon experiencing symptoms of COVID-19, payable at the employee's full rate, capped at \$511 per day and \$5,110 in the aggregate.
3. To comply with a federal, state or local quarantine or isolation order related to COVID-19, payable at the employee's full rate, capped at \$511 per day and \$5,110 in the aggregate.
4. To care for or assist a family member who is subject to a quarantine order or has been advised by a health care provider to self-quarantine. In this case, the employer is to pay the employee two-thirds of the employee's rate, capped at \$200 per day and \$2,000 in the aggregate.
5. To care for a child if the child's school or place of care is closed due to COVID-19, payable at the rate of two-thirds of the employee's rate, capped at \$200 per day and \$2,000 in the aggregate.
6. If 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 Secretary of Labor, payable at the rate of two-thirds of the employee's rate, capped at \$200 per day and \$2,000 in the aggregate.

An employer may not require that employees find a replacement to cover the time that they use paid sick leave as a condition of receiving or using the emergency paid sick leave.

Other key provisions

Interaction with other PTO: The emergency paid family and sick leave benefits can be used in addition to any other PTO provided by the employer, but the employer cannot require employees to exhaust other PTO before taking the emergency paid leave. Employees may use the emergency paid leave first if they choose to do so and then supplement it with other PTO to reach their full wage rate.

Variable hours: For employees who work variable hours, employers must look at the average number of hours the employee was scheduled to work over the six-month period preceding the leave. If the employee has worked less than six months, the leave entitlement is to be based upon "the reasonable expectation of the employee at time of hiring."

Tax credit for private employers: The FFCRA provides private-sector employers with a 100 percent tax credit for each calendar quarter to be applied against the employer's Social Security tax. If the cost of providing paid sick leave or paid family leave exceeds the tax credit, the government will refund the difference. This credit and refund does not apply to public employers, because they do not pay into the Social Security system.

Free testing and treatment for COVID-19: Group health plans cannot charge plan participants to pay for COVID-19 testing or treatment related to testing. This includes co-pays, deductibles or any other charges.

[1] The original House bill also proposed paid family leave for additional qualifying reasons, including if the employee was diagnosed with COVID-19, was quarantined or isolated, or had to care for a family member diagnosed with COVID-19. The final Senate version of FFCRA eliminated those additional qualifying reasons.