

## Coronavirus/COVID-19 Legal Update[1]

Articles, News March 19, 2020

### BREAKING NEWS:

President Trump signed the Families First Coronavirus Response Act (“FFCRA”) into law on Wednesday, March 18, 2020. It will take effect within 15 days.

The FFCRA requires employers with fewer than 500 employees[2] to provide two different kinds of paid leave for certain Coronavirus/COVID-19-related reasons. The costs of these paid leaves will be offset by tax credits (against the 6.2% social security tax payment employers usually make to the federal government with each payroll)[3].

The two leaves are as follows:

- **Paid sick time.** Employees shall receive paid[4] sick leave[5] if they are unable to work (or telework) due to a need for leave because:
  - a. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
  - b. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  - c. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  - d. The employee is caring for an individual who is subject to an order as described in a., above, or has been advised as described in b., above;
  - e. The employee is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions;
  - f. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
- **Expanded FMLA leave.** Employees who have been employed for at least 30 days are entitled to up to 12 weeks of job-protected[6] paid[7] leave if they are unable to work (or telework) due to a need to care for the 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 COVID-19-related public health emergency.

It is very important to note that not all Coronavirus/COVID-9-related reasons trigger the right to these leaves. For example, the FFCRA does NOT require employers to provide paid leave under broader circumstances, e.g., an employer’s decision to cease operations, reduce headcount or hours, etc. It is up to employers to decide whether to expand their current paid time off plans/policies to cover these other situations.

Some other key attributes of the FFCRA:

- This paid sick time is to be made available to employees in addition to existing paid leaves and, accordingly, an employer cannot require an employee to use other paid leave before the employee uses this paid sick time;
- An employer cannot require, as a condition of providing this paid sick time, that employees search for or find a replacement to cover the hours they are off;
- This paid sick time shall be available for immediate use by employees regardless of how long any employee has been employed; and
- The requirement to provide both leaves sunsets on December 31, 2020.

So... what should an employer do now?

- It should definitively determine whether it has fewer than 500 employees;
- If it has fewer than 50 employees, determine whether it will seek a waiver;
- If it is covered by this law, it should make sure that its FMLA administrator/HR staff fully understands what circumstances are and are not covered by these two leaves so that it is ready to properly determine an individual employee's eligibility and otherwise administer these leaves (do we need to draft or revise policies, forms, etc.?); and
- Since there are many situations under which employees may miss work that are outside of the FFCRA's scope, it should decide how to handle the most foreseeable ones. (What if the employer sends most/some employees home? What if the employer wants some to work at home but others are unable to work offsite? What if an employee is asked to continue to report for work but objects for general reasons (not because he or she has been individually diagnosed, told to quarantine, etc.?)

For additional information contact Albert Lee.

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[1] DISCLAIMER: This is a general discussion and, therefore, neither constitutes nor substitutes for specific legal advice that takes into account your organization's specific jurisdiction(s) or circumstances. Please seek legal counsel if you need specific guidance.

[2] An employer may exclude employees who are health care providers or emergency responders from coverage under the FFCRA. Additionally, the Secretary of Labor has the authority to grant exemptions to businesses with fewer than 50 employees upon a showing that compliance would "jeopardize the viability of a business as a going concern."

[3] The government will establish a process by which employers are reimbursed if this credit does not fully cover the leave payments made.

[4] Leave time taken for reasons 1a.-c. is to be paid at the employee's regular rate of pay, subject to daily and aggregate limits of \$511 and \$5,110, respectively. Leave time taken for reasons 1d.-f. is to be paid at 2/3 of the employee's regular rate of pay, subject to daily and aggregate limits of \$200 and \$2,000, respectively.

[5] The duration of the paid sick leave is: 80 hours for full-time employees; or, for part-time employees, the number of hours each works on average over a two-week period.

[6] Employers with fewer than 25 employees are exempt from the requirement to restore an employee to his/her prior position (or an equivalent) upon the expiration of the need for leave, if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions.

[7] During the first two weeks of this expanded FMLA leave, an employee can opt (but not be required by the employer) to receive accrued vacation, personal, or sick leave. The remaining period is to be paid at 2/3 of the employee's regular rate, subject to daily and aggregate limits of \$200 and \$10,000, respectively.