

## Employment Law Update

### DOL & IRS guidance and more information concerning COVID-19 and *Families First Coronavirus Response Act*

The United States Department of Labor (DOL) and the Internal Revenue Service (IRS) have issued some guidance on the “Families First Coronavirus Response Act” (FFCRA) that includes provisions requiring emergency paid sick leave under certain circumstances and requiring additional partially paid leave under an expanded Family and Medical Leave Act (FMLA) that applies to some employers not previously subject to the FMLA. Significantly, **the DOL is taking the position that the effective date of the FFCRA is April 1, 2020**, even though the FFCRA says “This Act shall take effect not later than 15 days after the date of enactment of this Act,” and 15 days from March 18 is April 2. Links to the DOL and IRS guidance are below.

Also, for those of you in Alabama, Jefferson County, or the City of Birmingham (or have any business there), those governmental entities have issued various orders imposing restrictions related to COVID-19. The latest one by the City of Birmingham imposes a curfew and requires all residents to remain at their residences except for circumstances set out in the order. Those orders can be found here:

City of Birmingham:

[https://drive.google.com/file/d/1ZWARbdUj1XOEdRYV1njVyzRcxzr\\_kzh4/view](https://drive.google.com/file/d/1ZWARbdUj1XOEdRYV1njVyzRcxzr_kzh4/view)

Jefferson County:

<https://www.jcdh.org/SitePages/Misc/PdfViewer?AdminUploadId=728>

State of Alabama:

<http://www.alabamapublichealth.gov/legal/assets/order-publicgathering-032020.pdf>

Links to the DOL and IRS guidance is here:

DOL guidance: <https://www.dol.gov/agencies/whd/pandemic>

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave> (for employers)

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> (for employees)

<https://www.dol.gov/agencies/whd/flsa/pandemic>  
(this one addresses pandemics in general under the FLSA before the FFCRA, but still provides some helpful guidance)

<https://www.dol.gov/agencies/whd/fmla/pandemic>  
(this one addresses pandemics in general under the FMLA before expanded by the FFCRA, but still provides some helpful guidance)

IRS guidance: <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>

<https://www.irs.gov/newsroom/tax-day-now-july-15-treasury-irs-extend-filing-deadline-and-federal-tax-payments-regardless-of-amount-owed>

<https://home.treasury.gov/news/press-releases/sm948>

<https://www.irs.gov/coronavirus>

These webpages address a number of topics. One item that is of interest to employers with fewer than 50 employees is the hardship exemption over which the FFCRA gave discretion to the DOL to provide. The DOL has not issued anything definitive, but says it will be addressing this in more detail in regulations that are forthcoming: “To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations. You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.”

Another provision of the FFCRA that applies to employers not previously subject to the FMLA says: “An employer under 110(a)(B) shall not be subject to section 107(a) for a violation of section 102(a)(1)(F) if the employer does not meet the definition of employer set forth in Section 101(4)(A)(i).” That’s crystal clear, right? What that seems to mean is that an employer with fewer than 50 employees within a 75 mile radius is not liable for damages under the expanded FMLA provisions. Does that make compliance by an employer with fewer than 50 employees optional? There still may be a risk that an employee sues asking for an injunction to be reinstated to his or her job, and if the employee prevails, attorneys’ fees

could be awarded. Right now there are no civil penalties the DOL could impose, but there could be some regulations issued that impose penalties later. But the risk of not complying with the FMLA provisions is significantly lessened by this provision. Note, however, that employers with fewer than 50 employees are still subject to damages and significant penalties for failure to comply with the emergency paid sick leave requirement.

A modified version of the summary of the Families First Coronavirus Response Act previously published after it was passed is set out below.

## **Congress Passes *Families First Coronavirus Response Act***

In response to the Coronavirus Disease 2019 (COVID-19) (also referred to as severe acute respiratory syndrome coronavirus 2 or SARS-CoV-2), both houses of Congress have passed a law known as H.R. 6201 or “Families First Coronavirus Response Act” that has provisions significantly affecting employers in the United States. President Trump signed the bill into law on the evening of March 18, 2020. The law will take effect 15 days from that date, which is April 2, 2020. Here are the main things employers need to know and prepare for:

### **I. Emergency Paid Sick Leave**

Employers with fewer than 500 employees and government employers must provide full-time employees (working 40 hours per week) with **two weeks (80 hours) of paid sick leave** for specified circumstances related to COVID-19. Part-time employees (fewer than 40 hours per week) must be provided with paid sick leave in an amount equal to the hours the employee works on average over a two-week period.

#### **Circumstances under which an employee may use the emergency sick leave:**

- a. Self-isolation because the employee is diagnosed with COVID-19;
- b. To obtain a medical diagnosis or care if an employee is experiencing COVID-19 symptoms;
- c. To comply with a recommendation or order that the physical presence of the employee on the job would jeopardize the health of others because of (1) the exposure of the employee to COVID-19 or (2) the exhibition of symptoms of COVID-19 by the employee;

- d. To care for or assist an employee's family member who is self-quarantining because the family member has been diagnosed with COVID-19 or has symptoms of COVID-19 and needs to obtain a medical diagnosis or care;
- e. To care for or assist an employee's family member if a public official or a healthcare provider determines that the presence of the family member in the community would jeopardize the health of others due to COVID-19 exposure or the presence of COVID-19 symptoms; and
- f. To care for the child of the employee if the child's school or place of care has been closed or the child-care provider of the child is unavailable due to the COVID-19 public-health emergency.

**Amount of pay:** The amount of sick-leave pay is the employee's regular rate of pay, except when employees are absent to care for other family members, the amount of the sick-leave pay is the greater of 2/3 of the employee's regular rate of pay or the applicable minimum wage.

The two weeks of emergency paid sick leave is also capped at \$511 per day (\$5,110 total) per employee if the reason for the leave is due to

- 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 healthcare provider to self-quarantine due to concerns related to COVID-19; or
- the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

The two weeks of emergency paid sick leave is capped at \$200 per day (\$2,000 total) per employee if the reason for the leave is due to

- the employee is caring for an individual who is subject to an a federal, state, or local quarantine or isolation order related to COVID-19 or has been has been advised by a healthcare provider to self-quarantine due to COVID-19-related concerns; or
- the employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.

**Eligibility:** Paid sick leave is available for an employee to use immediately, regardless of how long the employee has been employed.

**Other sick-leave already provided by the employer:** Employers may not require employees to use other paid leave before the employee uses this emergency paid sick leave. And if the employer already provides paid sick leave, this additional two-week emergency paid sick leave must be provided in addition to what the employer already provides.

**Carry-over:** The emergency paid sick leave cannot be carried over after December 31, 2020.

**Notices:** The Department of Labor will issue notices or posters that employers must post with the litany of other employment-law posters they have.

**Retaliation:** Employers may not retaliate against employees for using emergency paid sick leave under this law for filing a complaint alleging violations of this law.

**Penalties/Enforcement:** Employers found to have violated the law will be considered to have violated the Fair Labor Standards Act (FLSA), and successful plaintiffs would be entitled to the same damages as provided by the FLSA (double lost pay and attorney's fees and costs). Intentional violators could be fined up to \$10,000, and repeat offenders (after a conviction of a first offense) could receive six months in prison.

**Expiration:** This law expires on December 31, 2020, unless renewed.

**Exemption for Small Employers:** There is no required exemption for employers with fewer than 50 employees.

## II. FMLA Expansion

This provision also applies to employers with fewer than 500 and expands the Family and Medical Leave Act (FMLA).

**Amount of leave:** The law provides for 12 weeks of leave. The first two weeks are unpaid, but the emergency sick-leave pay (above) may be used. So if the circumstances for the emergency paid sick leave apply, it is really full pay for those two weeks. Even if the emergency paid sick leave circumstances don't apply, an employee can still use any employer-provided paid sick or vacation time. For the remaining 10 weeks, the employer must pay at least 2/3 of the employee's regular pay if the leave is for the additional qualifying reason below, and the amount the employer is required to pay for those 10 weeks is capped at \$200 per day (\$10,000 total) per employee.

**Eligibility:** An eligible employee is any employee (full- or part-time) who has been employed for at least 30 calendar days by the employer. (This eliminates for the additional qualifying reasons below the standard FMLA requirement that to be eligible an employee

must work for the employer for 12 months and have worked 1,250 hours in the 12 months before taking leave.)

**Additional qualifying reason for FMLA leave:**

The employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee 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.

It isn't clear whether an employee who can technically work from home but child-care duties keep the employee from actually working means the employee is unable to work (or telework).

**Restoration to job/position:** Employers with 25 or more employees must restore employees who take COVID-19-related FMLA leave to the same or equivalent position when they return to work. But employers with fewer than 25 employees do not have to restore employees taking COVID-19-related FMLA leave to the same or equivalent position if (a) the employee's position does not exist after the employee's leave due to economic conditions or other changes in operating conditions of the employer and are caused by a public-health emergency during the period of leave *and* (b) the employer makes reasonable efforts to restore the employee to an equivalent position but fails. If the reasonable efforts of the employer to restore the employee fail, the employer must make reasonable efforts to contact the displaced employee for up to a year after the end the employee's 12-week leave (or one year from when it would have ended if the employee took 12 weeks) or a year after the end of the COVID-19 public-health emergency (whichever is earliest).

**Notice by employee to employer:** For COVID-19-related FMLA leave, employees are only required to give the amount notice that is practicable under the circumstances (which likely means very little notice).

**Exemption for Small Employers:** There is no required exemption for employers with fewer than 50 employees as there is with the current FMLA, but the law grants authority to the Department of Labor to issue regulations exempting small businesses with fewer than 50 employees when the imposition of the new requirements would jeopardize the company's ability to stay in business.

**Expiration:** This law expires on December 31, 2020, unless renewed.

**Penalties/Enforcement:** The penalties and enforcement is the same as under existing law for FMLA claims, except that employers with fewer than 50 employees within a 75-mile radius (that is, those not traditionally subject to the FMLA) are not liable for damages.

### **III. Tax Credits**

Employers will receive a refundable tax credit against the employer share of Social Security taxes equal to 100% of qualified emergency sick leave paid or pay under the expanded FMLA provisions for each calendar quarter. Check [www.irs.gov/coronavirus](http://www.irs.gov/coronavirus) for the latest information.

If you have any questions about this, about other employment issues arising from the COVID-19 public health emergency, about any other employment issues, or about any other COVID-19-related issues, please contact us.

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