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Families First Coronavirus Response Act

Insights for Employers

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March 27, 2020

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Families First Coronavirus Response Act

- March 18, 2020 - U.S. Senate approved, and the President signed, the House's **Families First Coronavirus Response Act**.
- The Act is designed to provide assistance to American workers in response to the novel coronavirus (COVID-19) spreading across the United States.

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What it Means for Employers

- Effective on **April 1, 2020**. Covered employers must start preparing now for the new law's impact.
- Two major provisions of the Act that impact employers are:
 1. The Emergency Family and Medical Leave Expansion Act.
 2. The Emergency Paid Sick Leave Act.
- Both Acts **will only apply to employers with fewer than 500 employees.**



The Emergency Family and Medical Leave Expansion Act

- The DOL has indicated it will publish regulations regarding the Act.
- It is expected that, given the two laws borrow significantly from the FMLA and FLSA, that a similar definition of "employer" as is currently included in DOL regulations currently in effect under the FMLA and FLSA will be used to interpret the Act.

The Emergency Family and Medical Leave Expansion Act

- Single Employer test
- Separate entities will be deemed to be part of a single employer for purposes of the FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage. 29 C.F.R. § 825.104.
- A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality.

The Emergency Family and Medical Leave Expansion Act

- Factors considered in determining whether two or more entities are an integrated employer include:
 - i. Common management;
 - ii. Interrelation between operations;
 - iii. Centralized control of labor relations; and
 - iv. Degree of common ownership/financial control.

The Emergency Family and Medical Leave Expansion Act

- § 825.106 Joint employer coverage.
 - a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities.

The Emergency Family and Medical Leave Expansion Act

- § 825.106 Joint employer coverage.

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

 - 1) Where there is an arrangement between employers to share an employee's services or to interchange employees;
 - 2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,
 - 3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

The Emergency Family and Medical Leave Expansion Act

- Amends the Family and Medical Leave Act (FMLA) on a temporary basis (through December 31, 2020).
- Provides certain employees with up to 12 weeks of FMLA-protected leave for reasons related to COVID-19.



The Emergency Family and Medical Leave Expansion Act

Specifically, The Emergency Family and Medical Leave Expansion Act modifies the FMLA **only with respect to COVID-19-related leave** as follows:

- **Expanded Definition of "Eligible Employee"**: Any employee (full or part-time) who has been employed for at least 30 calendar days by the employer.

Note, this replaces the typical requirement that the employee must work for an employer for 12 months and have worked 1,250 hours in the 12 months prior to taking leave.

- **Alternate Definition of "Covered Employer"**: An employer with fewer than 500 employees.

The Emergency Family and Medical Leave Expansion Act

- Covered employees may take COVID-19-related FMLA leave for “a qualifying need related to a public health emergency,” defined as follows:
 - “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.”
 - Note, the term “school” used above only includes elementary and secondary schools – not colleges and universities.
 - A “child care provider” (who is unavailable due to COVID-19) must be “a provider who receives compensation for providing child care services on a regular basis,” not a simply an unpaid family member who watches the child while the primary care-provider is at work.

The Emergency Family and Medical Leave Expansion Act

- **Paid Leave Requirement:** Whether covered employers are required to provide paid FMLA leave to their eligible employees when taking COVID-19-related FMLA leave depends on the length of the leave:
 - **First 10 Days:** The first 10 days of COVID-19-related FMLA leave are unpaid.
 - Note that these days would likely be covered by The Emergency Paid Sick Leave Act – discussed later.
 - Under The Emergency Family and Medical Leave Expansion Act, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave.
 - Employers may require their employees to use any accrued leave during these first 10 days.

The Emergency Family and Medical Leave Expansion Act

- Unclear from a practical perspective whether this would be permitted because The Emergency Paid Sick Leave Act prohibits employers from requiring employees from using other paid leave prior to using paid leave available under The Emergency Paid Sick Leave Act.
- Appears that the only paid leave employers may require their employees to use during this first 10 days would be paid leave available to those employees under The Emergency Paid Sick Leave Act.

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The Emergency Family and Medical Leave Expansion Act

- **After the Initial 10 Days:** After the 10 days of unpaid leave, covered employers must provide paid COVID-19-related FMLA leave at no less than two-thirds the employee's regular rate of pay **for the number of hours the employee would have been normally scheduled.**
 - For employees whose weekly schedules vary such that employers are unable to determine with certainty the number of hours the employee would have worked, employers must pay those employees based on the average number of hours the employee worked over **the prior 6 months, or (if the employee did not work the prior 6 months – such as in the case of new employees), the number of hours the employee was expected to work.**
 - **This paid leave entitlement is capped at \$200 per day and \$10,000 in the aggregate per employee.**
- **Notice Requirement:** In the case of foreseeable COVID-19-related FMLA leave, employees are required to give enough notice as is practicable.

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The Emergency Family and Medical Leave Expansion Act

- **Restoration to Position:** Like traditional FMLA leave, COVID-19-related FMLA leave is job-protected and employees taking COVID-19-related FMLA leave must be restored to their same or equivalent position when they return to work.
 - However, employers with fewer than 25 employees do not have to restore employees taking COVID-19-related FMLA leave to their same or equivalent position if:
 - 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 caused by a public health emergency during the period of leave.
 - The employer makes reasonable efforts to restore the employee to an equivalent position.
 - The employer makes efforts to contact any displaced employee if an equivalent position becomes available for up to a year after they are displaced.

The Emergency Family and Medical Leave Expansion Act

- The Secretary of Labor has the authority to:
 - Issue regulations "to exempt small businesses with fewer than 50 employees" from the requirements of the FMLA provisions of the Act "when the imposition of such requirements would jeopardize the viability of the business as a going concern."



The Emergency Family and Medical Leave Expansion Act

According to a 3/20/20 DOL Press Release:

- Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The exemption will be available on the basis of simple and clear criteria that make it available in circumstances involving jeopardy to the viability of an employer's business as a going concern. **The Department of Labor will provide emergency guidance and rulemaking to clearly articulate this standard.**



The Emergency Family and Medical Leave Expansion Act

According to a 3/20/20 DOL Press Release:

- The Department of Labor will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the act. Under this policy, the Department of Labor will not bring an enforcement action against any employer for violations of the act so long as the employer has acted reasonably and in good faith to comply with the act. The Department of Labor will instead focus on compliance assistance during the 30-day period.



The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act will generally require employers **with fewer than 500 employees** to provide employees with **two weeks of paid leave for one of six qualifying reasons**.

Specifically, The Emergency Paid Sick Leave Act would require the following:

- **Employee:** The Emergency Paid Sick Leave Act generally applies to all private employees who are covered by the Fair Labor Standards Act (FLSA).
- **Covered Employer:** All private employers covered by the FLSA and who employ fewer than 500 employees.



The Emergency Paid Sick Leave Act

- **The Reasons for Sick Leave:** Under the Act, an employee is only entitled to paid sick time if the employee 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 (a) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter 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.

The Emergency Paid Sick Leave Act

- Employers may elect to exclude health care providers and emergency responders from the Act's paid sick leave requirements.
- An employer is not required to provide paid leave to an employee who is subject to reduced hours or layoff because the employer's business has been impacted by COVID-19.



The Emergency Paid Sick Leave Act

- **Duration of Paid Sick Time:** Full-time employees are entitled to 80 hours of paid sick time, while part-time employees are entitled to the number of hours that the employee works, on average, over a two-week period.
 - Note, as with the changes to the FMLA, for employees whose schedules vary weekly, employers must pay those employees based on the average number of hours the employee worked over the prior 6 months
 - Or, if the employee did not work the prior 6 months – such as in the case of new employees, the number of hours the employee was expected to work.

The Emergency Paid Sick Leave Act

- **How Paid Sick Leave Is Paid:** Employers are required to pay paid sick time at the greater of:
 - a) The employee's regular rate or;
 - b) The applicable minimum wage.
- For reasons 1-3, employees get 100% of their pay; for reasons 4-6, employees get 2/3 of their pay.
- Like The Emergency Family and Medical Leave Expansion Act, the Act places caps on the maximum paid sick time to which employees are entitled:
 - ▶ For reasons 1-3, \$511 per day and \$5,111 in the aggregate and;
 - ▶ For reasons 4-6, \$200 per day, and \$2,000 in the aggregate.

The Emergency Paid Sick Leave Act

- **Immediate Availability:** Paid sick leave will be available for the employee regardless of how long the employee has been employed.
- **What About Existing Paid Leave Policies?:** If employers already offer paid leave to their employees, while they still must provide paid sick leave under this Act, **employers are free to alter their existing paid leave policies to help alleviate some of the impact of the Act's paid sick time requirements.**

The Emergency Paid Sick Leave Act

- **Sequencing:** An employee may first use the paid sick leave under The Emergency Paid Sick Leave Act and **employers may not require employees to use other paid leave before the employee uses the paid sick time under The Emergency Paid Sick Leave Act.**
 - Starting on April 1st, covered employers cannot make their employees use their PTO or vacation time before being paid under the Act.
 - However, before the Act goes into effect (i.e., before April 1, 2020), if an employee wants to be paid for leave, the employer can require the use of other paid leave.
 - Once employees have exhausted their paid leave afforded by The Emergency Paid Sick Leave Act, employers are free to require their employees to resume using their PTO and vacation time to receive full pay for time off.

The Emergency Paid Sick Leave Act

- **No Preemption:** The Act does not preempt any local and state law requirements regarding paid sick leave.
 - Employers must be careful to not ignore state and local laws governing paid sick leave, such as the Pittsburgh Paid Sick Days Act and the Philadelphia's Promoting Healthy Families and Workplaces Act – all requiring most employers to provide employees with paid sick leave.
- **No Replacement:** Employers are not allowed to condition the use of paid sick leave on the employee finding a replacement to "cover" for them.
- **No Carry-Over:** Paid sick leave hours cannot be carried over after December 31, 2020.

The Emergency Paid Sick Leave Act

- **No Retaliation:** The Act contains anti-retaliation protections for employees who:
 - a) Utilize paid sick leave under The Emergency Paid Sick Leave Act or;
 - b) File a complaint alleging violations of The Emergency Paid Sick Leave Act.

Any employers found to have retaliated against any employee, will be considered to have violated the FLSA. Successful plaintiffs would be entitled to the same damages as provided by the FLSA.

- **Penalties for Violation:** Employers who fail to provide their employees with paid sick time will be considered to have failed to pay minimum wages in violation of the FLSA. Successful plaintiffs would be entitled to the same damages as provided by the FLSA.

The Emergency Paid Sick Leave Act

- **Notice:** The Act further requires employers to notify their employees of their rights under The Emergency Paid Sick Leave Act by posting a notice in a conspicuous location. The Secretary of Labor was directed to make available a compliant notice within 7 days of enactment of the Act.
- Here is a link to the notice:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- FAQs re: the notice:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

The Emergency Paid Sick Leave Act

- **Secretary of Labor Regulations:** The Act also allows the Secretary of Labor to issue regulations:
 1. Excluding employers of certain health care providers and emergency responders from the coverage of the Act and;
 2. Exempting small businesses with fewer than 50 employees from providing paid sick leave under #5 above when the imposition of such requirements would jeopardize the viability of the business as a going concern.

Of Course The Families First Coronavirus Response Act is Not the Only Consideration

- Don't Forget:
 - The Pre-Act Provisions of the Family and Medical Leave Act
 - The Americans with Disabilities Act
 - The Pennsylvania Human Relations Act
 - Any Other Applicable State or Local Law

Providing Expanded Family and Medical Leave to Employees Affected by COVID-19 Online Dialogue

- The U.S. Department of Labor will be hosting a national online dialogue to provide employers and employees with an opportunity to offer their perspective as the Department develops compliance assistance materials and outreach strategies related to the implementation of the Families First Coronavirus Response Act (FFCRA).
- Anybody who is interested can participate online at <https://ffcra.ideascale.com> from March 23 through March 29, 2020.

Additional Resources

- **DOL Wage and Hour Division: Families First Coronavirus Response Act: Employer Paid Leave Requirements:**
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>
- **DOL: FFCRA Poster:**
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- **DOL Wage and Hour Division: Families First Coronavirus Response Act: Questions and Answers:**
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

The Emergency Paid Sick Leave Act

Importantly, the Act provides covered employers with refundable tax credits to be paid to employers to cover the costs associated with The Emergency Family and Medical Leave Expansion Act and The Emergency Paid Sick Leave Act.



Overview of Tax Implications

- First, reduction in the employer's FICA payment obligations for employees who are on leave under either of the leave provisions of the Act;
- Second, the employer will receive credit towards its FICA obligations based upon its payment of wages to employees who are on leave under either of the leave provisions of the Act;
- Third, *no* change in withholding requirements for employees' FICA and income taxes.



Reduction in FICA Payments

While news releases suggest that payroll tax liability is eliminated for employees who are on leave, that is not entirely accurate:

- FICA has two components, a 6.2% Social Security tax, and a 1.45% Medicare tax.
- The Act provides that wages paid under the leave provisions of the Act are not “wages,” but only as to the Social Security tax;
- Employers get a compensating credit to offset the Medicare tax component of FICA.

Credits for Emergency Paid Sick Leave

Employers receive credit for “qualified sick leave wages” which are certain wages paid under the Emergency Paid Sick Leave Act, plus

- Allocated health plan expenses; and
- Additional 1.45% of qualified sick leave wages (equal to Medicare tax).

The credit is refundable; and

To prevent double benefits, it is included in the employer’s income for tax purposes.

Qualified Sick Leave Wages

Qualified sick leave wages are limited to \$200 per person per day, which increases to \$511 per day if:

- 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 health care 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.

Credits for Emergency Family Leave

There is a similar structure for employers to receive credit for "qualified family leave wages."

The credit structure here is identical, comprising:

- Credit equal to qualified wages; plus
- Allocated health plan expenses; and
- 1.45% credit.

This credit is also refundable and is also included in the employer's income.

Qualified Family Leave Wages

- “Qualified family leave wages” are defined as wages that the employer is required to pay under the Emergency Family and Medical Leave Expansion Act.
- The wages taken into account per individual are \$200 per person per day, and \$10,000 in the aggregate.





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