

COVID-19: Employment Law Implications & Response Strategies



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- ▼ Finance
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- ▼ Business Continuity /
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CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



Unemployment Compensation

- ▼ For unemployment purposes, does it matter whether we call our strategy a furlough, layoff, or reduction in force?
- ▼ My employees are working or teleworking a part-time schedule. Am I short-changing them from unemployment?
- ▼ \$600/week in extra unemployment \$ has resulted in some of my employees refusing to return to work. What can I do about that?
- ▼ Can an employee who is on FFCRA leave (Emergency Paid Sick Leave or Emergency FMLA) also draw unemployment?
- ▼ As an employer, do I pay for any part of the enhanced unemployment benefits?

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ **PAID LEAVE ENTITLEMENTS**

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- $\frac{2}{3}$ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at $\frac{2}{3}$ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ **ELIGIBLE EMPLOYEES**

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.*

▶ **QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

- | | |
|---|---|
| <ol style="list-style-type: none">1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;2. has been advised by a health care provider to self-quarantine related to COVID-19;3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | <ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
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FFCRA Large Employer Exemption

- ▼ We are a controlled group of companies under IRS rules, and together have over 500 employees. Are we all exempt from FFCRA?
- ▼ We employ about 250 employees and various temp staffing agencies provide another 400 employees to our job site. Are we exempt from FFCRA?
- ▼ Prior to mid-March, we employed 600 employees, but we have over half of them on furlough today. Are we covered under or exempt from FFCRA?
- ▼ We have a number of subsidiaries and affiliated companies, some of which we control and some where we are hands off. We are probably an integrated employer exempt from FFCRA, but is it okay if some of our subs choose to comply with FFCRA anyway?

FFCRA “Exemptions”

- ▼ **Small Business Exemption**
 - ▼ We are a business with fewer than 50 employees. Aren't we exempt from FFCRA?
 - ▼ How do we assert a small business exemption?
- ▼ **Health Care Employers and Emergency Responders**
 - ▼ I read that health care employers are exempt, how does that work?
 - ▼ Can we exclude all of our employees?
 - ▼ Exclude just some of them?
 - ▼ For any FFCRA reason?
 - ▼ For just some FFCRA reasons?
- ▼ If we are exempt, what do we do about the FFCRA poster?

FFCRA Emergency Family Medical Leave (EFMLA)

- ▼ We have had some employees out due to childcare issues long before FFCRA took effect on April 1. Does the time they were out prior to April 1 count against their 12 weeks of EFMLA?
- ▼ Can I just designate the leave as EFMLA effective April 1?
- ▼ One of my employees took 12 weeks of FMLA earlier this year due to the birth of a child. Now she has requested EFMLA due to daycare closure. Do I have to approve her EFMLA, too?
- ▼ My employees say they can telework in the afternoons, while their children are napping, but cannot work the rest of the day. Can they take EFMLA intermittently?

FFCRA Emergency Paid Sick Leave (EPSL)

- ▼ We have employees who have tested positive or who are caring for spouses who have tested positive. How do we get them paperwork and collect signatures etc. without risking further spread of the virus?
- ▼ On April 2, one of my employees took EPSL to care for his spouse who tested positive and was told by a doctor to quarantine. Today, the employee reported that he has now tested positive. Does he get another 80 hours of EPSL?
- ▼ My employee qualifies for both EPSL and EFMLA due to a childcare closure. Does he have to get paid 2/3rds his regular rate or can he use his accrued PTO instead?

FFCRA In General

- ▼ We expect to receive PPP funds this week. We have other employees out drawing 2/3rds pay under FFCRA. Do I need to be concerned that we are paying some employees under PPP and others under FFCRA?
- ▼ We closed our doors and laid off all but our accounting and HR department last week due to a shelter in place order. Does this entitle our employees to FFCRA leave because a shelter in place order is a governmental quarantine order?
- ▼ We cut all work schedules in half, effective 4/1, but we remain open for business. Do my employees get paid their FFCRA paid leave based on the hours they were working before 4/1 or after?

Families First Coronavirus Response Act (FFCRA)

EFMLA & EPSL Documentation

- ▼ Employers **should request** and **must retain documentation** supporting employee's **written request** and **qualifying need** for leave:
 - ▼ The employee's **name**;
 - ▼ The **date or dates** for which leave is requested;
 - ▼ A statement of the **COVID-19 related reason** the employee is requesting leave and **written support for such reason**; and
 - ▼ A **statement that the employee is unable to work**, including by means of telework, for such reason.
 - ▼ Leave based on **order/advice** - include name of entity giving order, and, if not for the employee, that person's name and relation to the employee
 - ▼ **School Closure**: name and age of the child, name of school or place of care, representation that **no other person will be providing care** for the child, statement on **special circumstances why child age 14** or over needs care in daytime hours

Tax Credits for Employer Paid Leave Payments

▼ Employer Tax Credits

- ▼ Treasury has released **66 of its own FAQs** related to tax credits
- ▼ Payroll tax credits to employers equal to paid sick leave payments under both **FMLA and Paid Sick Leave** programs
- ▼ Credit for **employer-provided health insurance** under EFMLA
- ▼ Treasury has **authorized all federal payroll taxes (withheld income taxes, employer & employee share of Social Security and Medicare) for all employees to be used** as credit
- ▼ Credits in excess of federal payroll taxes would be treated as **overpayment** entitled to expedited refund from Treasury

* Employers may not use any **CARES SBA loan dollars** to provide a benefit for which a tax credit is allowed under FFCRA

Health and Welfare Benefits

- ▼ What health and welfare benefit changes do we *have to* make?
 - ▼ Section 6001(a) of the FFCRA, as amended by section 3201 of the CARES Act, requires plans and issuers to provide coverage for the following items and services:
 - ▼ COVID-19 Diagnostic Testing
 - ▼ *Items and services furnished to an individual during healthcare provider office visits (which includes in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product described in paragraph (1), but only to the extent the items and services relate to the furnishing or administration of the product or to the evaluation of the individual for purposes of determining the need of the individual for such product.*

Health and Welfare Benefits

- ▼ What health and welfare benefit changes *can we make?*
 - ▼ Telemedicine
 - ▼ FSAs, HRAs
 - ▼ Changes to offset the expenses of the mandatory coverage changes?

Health and Welfare Benefits

- ▼ How do we implement these changes?
- ▼ What about cafeteria plan elections?

Pension/Retirement Plan FAQs

- ▼ Do we *have to* implement the CARES Act changes to our 401(k) plan?
 - ▼ *Penalty-Free Coronavirus-Related Distributions*
 - ▼ *Expanded Plan Loans*

Pension/Retirement Plan FAQs

- ▼ Who are “*Qualified Individuals*” eligible to receive the CARES Act distributions and/or loans?
- ▼ How do we implement the CARES Act changes to our 401(k) plan?



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