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# FAMILIES FIRST CORONAVIRUS RESPONSE ACT (enacted March 18, 2020)

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On March 18, 2020, the Families First Coronavirus Response Act ("FFCRA") was enacted. It offers protections for workers impacted by the COVID-19 outbreak in the form of two different "Acts": the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA"). Under the EPSLA, employers must provide two weeks of paid sick leave to employees who need it to care for their own health or to care for others as a result of coronavirus. Under the EFMLEA, employers must also provide 12 weeks of leave to employees whose children's schools have been closed because of Coronavirus. **The federal government will fully reimburse employers for amounts they are required to pay to employees who use these new leave options.** These provisions took effect at the beginning of April and expire on December 31, 2020.

One week after passing the FFCRA, Congress adopted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Among other things, the CARES Act allows advance payment of employer credits under the FFCRA. The Department of Labor then announced regulations to implement the FFCRA, which substantially affect the implementation of the FFCRA leave benefits.

## Emergency Paid Sick Leave Act

Under the EPSLA, any **employer with fewer than 500 employees must provide up to 80 hours of paid sick time** to any employee who is unable to work (or telework) for any of the following reasons:

(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 is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine.

(5) The employee is caring for their child because the school or place of care of the child has been closed, or the child care provider 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

A full-time employee is entitled to 80 hours of paid sick time and a part-time employee is entitled to a pay rate based on their average number of hours worked per two-week period.

The federal requirement and the federal reimbursement do not apply to an employee's entire salary. They only require employers to pay up to a cap set in the law. On April 20 the Department of Labor issued an FAQ clarifying that employees may, but cannot be required to, use other forms of paid leave to supplement emergency paid sick leave.

An employee using paid sick time due to their own illness, reasons (1) through (3), above is entitled to their regular rate of pay – or the greater of the Federal or state/local minimum wage, if either is greater than the regular rate of pay – up to $5,110 total, a rate of $132,860 per year. An employee using paid sick time to care for another person, reasons (4) through (6), is entitled to two-thirds of their regular rate of pay, up to $2,000 total, a rate of $52,000 per year.
The Department of Labor also clarified that for purposes of reason (1) for emergency paid sick leave, stay-at-home and shelter-in-place orders count the same as quarantine or isolation orders.

This paid sick time must be made available to employees immediately, regardless of how long the employee has been employed by the employer. An employer may not require an employee to use other paid leave prior to using the paid sick time discussed above. Emergency paid sick leave does not count against any other form of leave granted to an employee.

Because of the different rates of reimbursement, we advise employers to work with payroll services providers to ensure separate tracking of leave in the two different reimbursement categories.

Federal reimbursement for emergency paid sick leave, but not expanded family and medical leave, is available to self-employed individuals, up to the cap on the rate of pay.

Employers must post a notice regarding the availability of this sick time with other required notices. The Department of Labor has published a model notice. Given the circumstances, we recommend employers email this notice to all employees, if you have not done so already, and post it in offices when appropriate.

The Department of Labor regulations make clear that individuals employed at an organization through a Professional Employer Organization ("PEO") or temporary staffing agency count towards the 499-

employee cap. Employees of the same PEO or temporary staffing agency who are employed by a different PEO-client do not count towards the cap for that organization. The regulations state: "To determine the number of Employees employed, all *common* Employees of joint employers or all Employees of integrated employers must be counted together." 29 CFR § 826.40(a)(2) (emphasis supplied).

The Department of Labor allows for broad application of the exemption for employers of health care workers. The exemption may apply not only to front-line providers of health care and emergency responders, but also to those who work for the same employers. 29 CFR § 826.30(c). Health care employers who choose not to use the exemption can provide their employees with COVID-19-related leave and receive reimbursement from the federal government.

Employers of fewer than 50 employees may exempt themselves from COVID-19-related leave requirements so long as they keep a written record stating that observing the requirements would jeopardize the viability of their operations. 29 CFR § 826.40(b).

Employees may want to use COVID-19-related leave incrementally, such as 3 hours a day for home-schooling. The FFCRA does not address this use specifically, although it would have been consistent with intermittent leave long allowed under the Family and Medical Leave Act ("FMLA"). **The regulations allow intermittent leave but with a new limitation: employees may only use COVID-19-related leave incrementally if their employer agrees.** 29 CFR § 826.50.

**Emergency Family and Medical Leave Expansion Act**

Since 1993, under the FMLA, employees of covered employers have been entitled to 12 weeks of unpaid leave to care for their own health or for a family member. The EFMLEA entitles an eligible employee up to 12 weeks of a mix of unpaid and paid leave if they are unable to work (or telework) due to a need to care for their child (under 18 years of age) if the child's school or child care center has been closed, or the paid child care provider is unavailable, due to a COVID-19 public health emergency declared by a government authority.

There are two crucial distinctions between this COVID-19-related FMLA leave and FMLA leave taken for other reasons. First, any employee is eligible for the COVID-19-related leave if they have been employed for at least 30 calendar days, while only employees employed for 12 months and 1,250 hours are eligible for FMLA leave taken for other reasons. Second, with respect to COVID-19, the new law greatly expands the number of employers covered by the FMLA. Any employer of fewer than 500 employees must provide the COVID-19-related leave; FMLA leave for other reasons applies only to employers who employ 50 or more workers within a 75 mile radius.

The Secretary of Labor may exempt "small businesses" with fewer than 50 employees from the COVID-19-related leave requirement when it would "jeopardize the viability of the business as a going concern."

The Department of Labor regulations only require that employers keep, in their own files, an explanation for using the small business exemption. Approval from the Department of Labor is not required. 29 CFR § 826.40.

The first 10 days of COVID-19-related leave may be unpaid, though an employee may elect to substitute emergency paid sick leave, any accrued vacation leave, personal leave, or medical or sick leave for this unpaid period (including the COVID-19 sick leave described above). After the initial 10 days, the employer must pay the employee not less than two-thirds of their regular rate of pay for the remainder of the leave, up to $200 per day and $10,000 total. Unlike emergency paid sick leave, employers that are covered both by the original FMLA and the EFMLEA should count both kinds of FMLA leave towards a single 12-week annual allocation.

In its April 20 FAQ, DOL announced that employers may require employees to use any other form of paid leave during EFMLEA leave. When that happens, the employee will receive full pay and the employer will receive payroll tax credit for pay up to the statutory cap.

In general, an employer must restore an employee returning from FMLA leave to the same or an equivalent position. But, under the new law, employers of fewer than 25 employees (who previously had no FMLA obligations at all) are not required to restore an employee to the same or an equivalent position, if the position held by the employee prior to taking the COVID-19-related leave does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by the COVID-19 outbreak. The employer must make reasonable efforts to restore the employee to an equivalent position and, if the reasonable efforts fail, the employer must make reasonable efforts to contact the employee if an equivalent position becomes available for a period of one year beginning on the earlier of the date on which the public health emergency ends or the date that is 12 weeks after the employee's leave commences.

An employer of fewer than 50 employees that fails to comply with the FMLA provisions of the new law will *not* be subject to the FMLA's provision allowing employees to sue the employer but the Department of Labor could take enforcement action.

**Refundable Tax Credit for Wages Paid**

Employers with 500 or fewer employees will be allowed to take a tax credit equal to 100% of the COVID-19-related sick leave wages and FMLA leave wages and a proportionate share of qualified health plan expenses paid during the quarter. The credit is taken against quarterly payroll taxes. If an employer's tax credit exceeds the amount paid in payroll taxes, the employer will get a refund. So, the net effect is that the amount of **all wages and health plan benefits paid for COVID-19-related sick and FMLA leave come back to the employer**, first as a credit against payroll taxes owed, and then the remainder as a refund. The federal government will reimburse employers for health care expenses in proportion to the pay reimbursement levels in the FFCRA.

After passage of the FFCRA, the CARES Act added that employers could withhold funds from all of their withholding tax obligations, not just from payments for employees taking COVID-19 related leave, as a form of advance payment of employer credits. These payments should be reflected on the Employer's Quarterly Tax Return, IRS Form 941. Shortly after the CARE Act passed, the IRS introduced Form 7200, Advance Payment of Employer Credits Due to COVID-19. IRS instructions on using the advance payments are available here.

The IRS instructs employers to keep documentation of:

- Calculation of the amount of qualified sick and family leave wages eligible for the credit.
- Calculation of the amount of the employee retention credit.
- Calculation of qualified health plan expenses allocated to wages
- The determination that the employees were qualified to receive sick and family leave wages.