

# HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

MARCH 20, 2020

## Coronavirus Relief Bill Signed Into Law

*This article has been revised to correct a formatting error in the original version.*

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“FFCRA”) into law. The law will go into effect on April 2, 2020, and the obligations discussed below will end on December 31, 2020. While the law includes several provisions designed to stimulate the economy and assist families during the current public health emergency arising from COVID-19 (commonly known as the Coronavirus), two key parts of the law will directly impact employers with fewer than 500 employees.

The FFCRA provides for two weeks of mandatory, paid emergency leave and includes provisions that expand the Family and Medical Leave Act (“FMLA”) for all covered employers.

### WHICH EMPLOYERS ARE REQUIRED TO PROVIDE THESE BENEFITS?

Generally, all private employers with fewer than 500 employees and all public sector employers with at least one employee are covered by the law. The following employers are exempt from the FFCRA:

- Private employers with 500 or more employees.
- Businesses with fewer than 50 employees that can show the FFCRA’s requirements would “jeopardize the viability of the business as a going concern.” At the moment, it is unclear what standards must be met to meet this exemption. Guidance on this hardship exemption is expected to be released soon by the Department of Labor.
- Health care providers and emergency responders. At the moment, it is unclear who precisely qualifies for this exemption. Guidance on the specific applicability of this exception is expected to be released soon by the Department of Labor.

### TWO-WEEK PAID EMERGENCY LEAVE

The FFCRA requires that covered employers provide one “bucket” of 80 hours of emergency paid leave for all full-time employees. Part-time employees must also be given emergency paid leave based on the number of hours they work, on average, over a two-week period. All employees must be given emergency paid leave regardless of how long they have worked for the employer. The emergency paid leave does not carryover from one year to the next, and employers do not have to pay out employees for any unused emergency paid leave upon separation from employment.

An employee qualifies for paid leave if the employee is unable to work (or telework) because:

- The employee is subject to a federal, state, or local quarantine or isolation order related to the Coronavirus;
- The employee self-isolates at the advice of a health care provider due to diagnosis of or other concerns related to the Coronavirus;
- The employee is obtaining a medical diagnosis because the employee is experiencing the symptoms of the Coronavirus;

Employees who qualify under the above conditions must be paid at their regular rate of pay or \$511.00 per day, whichever is less. Under these circumstances, each employee's paid emergency leave is capped at a total of \$5,110.

Under the law, the same "bucket" of 80 hours of paid leave may also be used by an employee who is unable to work (or telework) because:

- The employee is caring for an individual a) who is subject to a federal, state, or local quarantine or isolation order related to the Coronavirus, or b) who is self-isolating at the advice of a health care provider due to diagnosis of or other concerns related to the Coronavirus;
- The employee is caring for the employee's son or daughter 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."
- The employee is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services.

Employees who qualify for the above conditions must be paid at either 67% of their regular pay or \$200.00 per day, whichever is less. Under these circumstances, each employee's paid emergency leave is capped at a total of \$2,000.

## **CALCULATING THE AMOUNT OF LEAVE FOR PART-TIME EMPLOYEES WITH VARYING SCHEDULES**

If an employer is not able to determine with certainty the number of hours a part-time employee would have worked over a two-week period, employers should use an average of the number of hours that the employee was scheduled per day over the 6-month period ending at the time the employee first takes paid emergency leave. If the employee did not work over the prior 6-month period, the employer should use the reasonable expectation of the employee at the time of hiring as to the average number of hours per day that the employee would normally be scheduled to work.

## **PAID EMERGENCY LEAVE MUST BE GIVEN IN ADDITION TO OTHER PAID LEAVES**

The paid emergency leave under the FFCRA must be given in addition to any existing PTO, sick, or other paid leave provided by the employer. Employers cannot require that employees use other forms of paid leave before using the paid emergency leave under the FFCRA. However, unlike an earlier version of this bill that did not become law, the FFCRA does not prevent an employer from modifying its existing leave policies. Employers that have already implemented emergency Coronavirus paid leave policies can modify their existing policies to conform with this new required leave so employees are not entitled to both.

## **EMPLOYERS CANNOT REQUIRE EMPLOYEES TO FIND REPLACEMENTS**

An employee who is eligible for emergency paid leave under this law cannot be required to search for and find a replacement employee to cover the employee's scheduled work hours.

## NOTICE REQUIREMENTS

The Department of Labor is preparing a notice that employers must post in conspicuous places on their premises where notices are customarily posted. Implemented emergency Coronavirus paid leave policies can modify their existing policies to conform with this new required leave so employees are not entitled to both.

## ANTI-RETALIATION

Employers may not discharge, discipline, or discriminate against any employee who takes emergency paid leave in accordance with the law or who has filed a complaint or testified (or will testify) in a proceeding related to this law.

## PUBLIC HEALTH EMERGENCY FMLA EXPANSION

The second major component of the FFCRA that directly impacts employers is the temporary expansion of the federal FMLA. Employees who have been employed by a covered employer for at least 30 days may qualify for leave under the FFCRA's Family and Medical Leave Expansion Act. This law expands the definition of "covered employer" for purposes of public health emergency FMLA leave. A covered employer is any employer with fewer than 500 employees for each working day.

## AMOUNT OF LEAVE AND PAY DURING LEAVE

Covered employers must provide public health emergency FMLA leave for full and part-time employees. The first 10 working days of this public health emergency FMLA leave is unpaid, but employees may substitute emergency paid leave under the FFCRA or any other accrued paid leave to receive pay during this 10-day period. Unlike normal FMLA leave which is unpaid, after the first 10 days of public health emergency FMLA leave, the employer must pay the employee at two-thirds their regular pay for the number of hours the employee would otherwise be normally scheduled to work. This pay is limited to no more than \$200 per day and \$10,000 in total for each employee.

## CALCULATING HOURS OF LEAVE FOR EMPLOYEES WITH VARIABLE SCHEDULES

If an employer is not able to determine with certainty the number of hours an employee would have worked over a two-week period, employers should use an average of the number of hours that the employee was scheduled per day over the 6-month period ending at the time the employee first takes public health emergency FMLA leave. If the employee did not work over the prior 6-month period, the employer should use the reasonable expectation of the employee at the time of hiring as to the average number of hours per day that the employee would normally be scheduled to work.<sup>[1]</sup>

## QUALIFYING FOR PUBLIC HEALTH EMERGENCY FMLA LEAVE

Eligible employees may take public health emergency FMLA leave if the employee is unable to work (or telework) due to the need for leave to care for the employee's son or daughter under 18 years of age if the school or place of care of the employee's son or daughter has closed, or the child care provider of such son or daughter is unavailable, due to the public health emergency. In any case where the necessity for leave is foreseeable, an employee must provide the employer with as much notice of the leave as is practicable.

## RIGHT TO JOB RESTORATION AND CONTACT REQUIREMENTS

Employers with fewer than 25 employees are exempt from job restoration requirements. All other employers must make reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, unless the position held by the employee does not exist upon the employee's return due to economic conditions caused by the public health emergency.

If an employee is not restored to his/her former position, an employer must make reasonable efforts to contact the employee if an equivalent position becomes available within one year beginning on the earlier of a) the date on which the employee's need for leave concluded, or b) 12 weeks after the date on which the employee's leave commenced.

Additional guidance should be forthcoming from the Department of Labor as to whether such an employee is automatically entitled to this position or if the employee merely has the right to apply for such a position.

## **INTEGRATING THIS LEAVE WITH OTHER FMLA LEAVE**

Public health emergency FMLA leave counts toward an employee's total of 12 weeks of "regular" FMLA leave. If an employee has already used some FMLA leave for other qualifying reasons, the amount of public health emergency FMLA is reduced by the amount of FMLA the employee has already taken.

Employees are not able to take this leave intermittently.

## **NON-INTERFERENCE AND NON-RETALIATION**

As with any form of FMLA leave, no employer can interfere with the right of an employee to take public health emergency FMLA leave, nor can an employer retaliate against an employee for taking this leave.

## **TAX IMPLICATIONS**

Any wages paid to employees due to either type of FFCRA leave are not subject to either FICA or Medicare taxes.

To help private employers pay for the cost of the new FFCRA paid leave benefits, private employers will be able to take a refundable tax credit equal to the amount of benefits paid to qualifying employees. The credit is applied against the employer's share of FICA and Medicare tax liability for the quarter in which the sick leave pay is paid. If the total sick leave payments made by the employer exceed its share of such taxes, the difference is refundable to the employer. Note that public employers are not eligible for these tax credits.

## **CONCLUSION**

The FFCRA will inevitably raise many questions for employers, particularly smaller employers who might be concerned about their ability to afford these leave benefits.

The Boardman Clark Labor & Employment team is available to assist you as you navigate these complex issues in order to plan for this law taking effect on April 2, 2020.

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<sup>1</sup> Note that this calculation for FMLA leave applies to all employees with varied schedules, whereas with respect to emergency paid leave, this calculation only applies to part-time employees.

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