



Highlights of the Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA), which is an economic stimulus plan to address the impact of the COVID-19 pandemic, was signed into law on March 18, 2020. The U.S. Department of Labor has issued guidance stating that the new law will take effect on April 1, 2020 (note: this is a change from the initial understanding that the law would take effect April 2, 2020). While the law contains a range of provisions affecting government benefit programs and COVID-19 testing, the focus of this summary is on those provisions directly applicable to employers. As described more fully below, the FFCRA contains provisions requiring protected and partially-paid leave for employees forced to miss work when their child's school is closed due to the outbreak, as well as provisions creating a right to emergency paid sick leave for certain absences related to the outbreak.

Expansion of FMLA

This section of the new law expands the FMLA by allowing eligible employees to take protected leave for coronavirus-related childcare reasons and obligates employers to provide paid leave after the first two weeks of absence. Private employers are entitled to a tax credit for providing paid leave under this law. The law will remain in effect through December 31, 2020.

- **Covered Employers**: All public employers are covered. Applies to private sector employers with fewer than 500 employees.
- **Eligible Employees**: Employees are eligible for Public Health Emergency Leave ("PHEL") if they have been on the employer's payroll for at least 30 days. The normal standard of 1250 hours worked is not applicable to PHEL.
- **Covered Leave**: An eligible employee is entitled to take up to 12 weeks of protected leave if the employee is unable to work (or telework) based on a need to care for a child under age 18 due to closure of the child's school or unavailability of the child's childcare provider due to a public health emergency. A public health emergency means an emergency with respect to COVID-19 declared by a federal, state, or local authority.
- **Paid Leave Requirements**: The first 10 days of PHEL/FMLA may be unpaid, but employees must be allowed to use their accrued leave (vacation, personal, medical, or sick); the use of accrued leave is the employee's choice.
 - For leave beyond the first 10 days, the employer must pay the employee at least two-thirds of the employee's regular pay.

- Pay is calculated based on the number of hours the employees would otherwise be scheduled to work. For employees whose schedule varies, the hours are determined based on the average number of hours scheduled over the 6-month period ending on the date on which leave starts, including any leave hours; or based on a reasonable expectation at the time of hiring.
 - Paid leave shall not exceed \$200 per day and \$10,000 in the aggregate, per employee.
- Job Restoration. The new law is somewhat confusing as to the effect of a layoff. Under the existing FMLA statute, an employee has no greater right to reinstatement or to other benefits than if the employee had not taken leave; in other words, if the employee would have been laid off even if he/she had not taken leave for reasons unrelated to the taking of FMLA leave, the employee is not entitled to restoration. The FFCRA includes language providing that an employer with fewer than 25 employees will not be obligated to restore an employee following PHEL where: (i) the position held by the employee no longer exists due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency; and (ii) the employer makes reasonable efforts to restore the employee to an equivalent position; and (iii) if no equivalent position is available, the employer makes reasonable efforts to contact the employee about other equivalent positions for one year. It is unclear why these more onerous conditions would only apply to smaller employers. It seems likely that legislators expected that employers with 25 or more employees would be required to restore an employee to their position following PHEL/FMLA leave notwithstanding a reduction in force implemented during the employee's leave; however, this legislation did not address the pre-existing FMLA rule summarized above. The new law also does not address the employer's obligation to keep the employee in partially-paid status (by paying two-thirds of the employee's regular pay) during a PHEL/FMLA leave if the employee's position is eliminated during the leave due to a layoff. It is hoped that Department of Labor regulations or publications will provide further guidance on this key issue.
- Employer Tax Credit for Private Employers. Most private employers will be entitled to a tax credit equal to 100 percent of the family leave benefits paid to employees. This credit is applied against the tax imposed by IRS Code Section 3111(a) (the employer portion of Social Security taxes). The amount of family leave wages taken into account for this credit for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. If the credit exceeds the employer's total liability under Section 3111(a) for all employees for any calendar quarter, the excess credit is treated as an overpayment and is refundable to the employer. **Government employers are not entitled to the tax credit.**
- The Employer May Exclude Health Care Providers and Emergency Responders. The law states that an employer may exclude health care providers and emergency responders from application of the law.

- Uncertainty Regarding Obligations of Smaller (Under 50) Employers. The law provides that the Secretary of Labor **may** adopt rules exempting employers with fewer than 50 employees from the requirements of this law if compliance would jeopardize the employer’s ability to continue operations. The law also states that such smaller employers may not be subject to the enforcement provisions of the law. Commentators have recognized the lack of clarity regarding small employer obligations under the new law and it is hoped that the Secretary of Labor will issue regulations addressing this area of uncertainty.

Emergency Paid Sick Leave

This section of the new law requires employers to provide up to 10 days of emergency paid sick leave for certain coronavirus-related reasons. This sick leave is in addition to leave benefits already available to employees under employer policies. Private-sector employers may be entitled to a tax credit for providing paid sick leave under this law. The law will be in effect through December 31, 2020.

- Covered Employers: Applies to all public employers, as well as private sector employers with fewer than 500 employees.
- Eligible Employees: Includes all individuals who meet the definition of employee under the FLSA, which broadly covers all individuals employed by an employer, including a public employer (but excludes elected officials and those who volunteer for a public agency for no more than nominal compensation).
- The Employer May Exclude Health Care Providers and Emergency Responders. As with the PHEL/FMLA provisions, an employer may exclude health care providers and emergency responders from application of the emergency paid sick leave law.
- Covered Reasons for Using Paid Sick Leave: Employees are entitled to use emergency paid sick leave if unable to work (or telework) for 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 is seeking a medical diagnosis.
 4. To care for an “individual” who is self-isolating for one of the reasons described in (1) or (2) above. Note: there is no longer a requirement that the “individual” for which the employee is caring be a family member, which represents a significant change from the earlier version of this legislation.
 5. To care for the employee’s child under age 18 due to closure of the child’s school or unavailability of the child’s childcare provider due to COVID-19 precautions. A “child” is defined the same as under the FMLA; *i.e.*, a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco

parentis who is either under 18 years of age or is 18 years of age or older and “incapable of self-care because of a mental or physical disability” at the time leave is to commence.

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. Presumably, future regulations will elaborate on this reason.
- Paid Sick Leave Entitlement; Notice. Full-time employees are entitled to up to 80 hours of emergency paid sick leave. Part-time employees are entitled to the number of hours they typically work over a two-week period. This leave is **in addition to accrued leave** to which the employee was already entitled under employer policies or programs. The law provides that after the first workday (or portion thereof) that an employee takes emergency paid sick leave, the employer may require the employee to follow reasonable notice procedures as a condition of continuing to receive paid sick leave.
 - Carryover; Termination of Benefit. Emergency paid sick leave available under this law does not carry over from one year to the next. The law further provides that paid sick leave provided under this law shall cease beginning with the employee’s next scheduled work shift immediately following the termination of the need for paid sick time. However, to the extent the employee subsequently needed additional time off for a covered reason prior to December 31, 2020, the employee should be permitted to use any remaining emergency sick leave they have available.
 - Reduced Benefit for Certain Leaves; Cap on Sick Leave Amount. Where leave is taken for reasons (1), (2), or (3) above (which cover leave due to the employee’s own health or quarantine), the sick leave benefit must be equal to the employee’s regular rate of pay for the missed work time, provided that sick leave can be capped at \$511 per day and \$5,110 in the aggregate when leave is taken for these reasons. Where leave is taken for reasons (4), (5), or (6) above (to care for another, to care for a child due to a school closure or unavailability of childcare, or where the employee is experiencing a substantially similar condition), the required sick leave benefit is two-thirds of the employee’s regular rate of pay, provided that sick leave can be capped at \$200 per day and \$2,000 in the aggregate when leave is taken for one of these reasons.
 - Use of Paid Sick Leave; Sequencing with Other Leave. Employees will be entitled to access this paid sick leave immediately, regardless of how long they have been employed with the employer. Employees may access this emergency paid sick leave first, before using other forms of paid leave available to them; in other words, an employer cannot force the employee to exhaust other forms of paid leave before using emergency paid sick leave. Note: an employee may be eligible for both PHEL/FMLA and emergency paid sick leave. The law does not address how the two benefits interact. Presumably, where an employee is absent for a leave covered by both sections of the law, an employee would access the emergency paid sick leave first during the two initial weeks of unpaid PHEL/FMLA, then take the remaining PHEL/FMLA leave. Alternatively,

an employee might elect to take PHEL/FMLA first, using accrued leave during the first two weeks of unpaid PHEL/FMLA; the employee could then use emergency paid sick leave and the remaining PHEL/FMLA consecutively to extend the overall duration of the protected leave.

- **Model Notice.** Employers will be required to post a notice explaining employees' rights under this law. The notice is now available on the U.S. Department of Labor's website (https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf).
- **Tax Credits for Private Employers.** Most private employers will be entitled to a tax credit equal to 100 percent of the paid sick leave benefits paid to employees, subject to certain daily caps. This credit is applied against the tax imposed by IRS Code Section 3111(a) (the employer portion of Social Security taxes). If the credit exceeds the employer's total liability under Section 3111(a) for all employees for any calendar quarter, the excess credit is treated as an overpayment and is refundable to the employer. **Government employers are not entitled to the tax credit.**

Expansion of Unemployment Benefits

The new law also authorized \$1 billion in grants to states to support efforts to provide unemployment benefits to employees. In order to be eligible for this funding, states must meet certain requirements, one of which is that the state require employers to notify laid-off workers of their potential eligibility for unemployment benefits at the time of separation. This employer requirement is not directly imposed on employers by the FFCRA, but employers should expect to see the Washington Employment Security Department quickly adopting such an employer requirement to ensure Washington's eligibility for federal funding. Accordingly, in anticipation of this imminent requirement, employers contemplating layoffs should include information about unemployment eligibility in their layoff communication planning. Even without such a requirement, informing employees about available benefit programs is advisable.

Important Notification

This FFCRA summary is intended to provide an overview of key provisions of this new law. This summary is not intended to be, and should not be interpreted as, legal advice. Employers are encouraged to contact a Summit Law Group attorney or other legal counsel for guidance regarding particular situations.

Please join us for Summit's upcoming webinar:

Updates on COVID-19 Employment Issues, Including Families First Coronavirus Response Act

March 27, 2020

10 am – 11 am

Summit Attorney Sofia Mabee will provide an update on current developments, including:

- New leave entitlements in the Families First Coronavirus Response Act;
- Workplace recommendations by the CDC including health screening; and
- Other legal compliance issues, including employee privacy, wage/hour compliance and layoffs/furloughs

Please join us! To register, send an email to webinar@summitlaw.com. For all subscribers to Summit Law Group's webinar program, registration is free. Nonsubscribers may register for \$50 per employer. Take care and be safe!