



## Highlights of the Families First Coronavirus Response Act

(Updated April 3, 2020)

*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, and took effect April 1, 2020. Since Summit prepared its initial summary of the FFCRA, the U.S. Department of Labor (DOL) has issued several waves of guidance, as well as temporary regulations. Summit is therefore updating this summary to incorporate these developments. New guidance will be shown in **red font** so that readers can easily focus on what has been added to the summary. Portions of the initial summary that have been superseded by recent guidance will be indicated by ~~strikethrough~~. While the FFCRA 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.

- According to DOL regulations, an employee is able to telework if: “(a) his or her Employer has work for the Employee; (b) the Employer permits the Employee to work from the Employee’s location; and (c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the Employee from performing that work. Telework may be performed during normal hours or at other times agreed by the Employer and Employee.”
- DOL regulations indicate that to be eligible for PHEL leave, an employee must represent that no other suitable person will be providing care for the child during the period for which the employee is receiving family medical leave.
- Intermittent Use. Employers may allow employees to take PHEL/FMLA intermittently, but are not required to do so.
- 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. Employees may also be entitled to use Emergency Paid Sick Leave (EPSL, described below) during the first 10 days of PHEL/FMLA leave.
  - 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 for PHEL shall not exceed \$200 per day and \$10,000 in the aggregate, per employee.
  - DOL regulations provide that while an employee is receiving two-thirds of regular pay during PHEL leave, the employee may elect or the employer may require the employee to use leave that would otherwise be available to an employee under existing policies (e.g., accrued leave). This would allow an employee to remain in fully-paid status by supplementing PHEL benefits with accrued leave. Note, however, that the tax credits available to a private employer would be limited to the benefits required under the FFCRA.
- 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.~~ DOL has clarified that employees may be laid off or furloughed while on PHEL or using EPSL, and that if an employee is laid off or furloughed, the employer is not responsible for continuing to pay the employee for PHEL or Emergency Paid Sick Leave. Similarly, if an

employee's scheduled work hours are reduced, the employee is not eligible for PHEL or EPSL for the hours they are no longer scheduled to work.

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.**
- Employers Do Not Pay the Social Security Portion of the FICA Tax on Wages Paid as PHEL/FMLA Benefits. Paid leave benefits are normally subject to the FICA tax. However, under the FFCRA, employers do not pay the social security (OASDI) portion of the FICA tax with regard to any wages paid out as PHEL/FMLA benefits or EPSL. Employers must still pay the Medicare portion of the FICA tax and must withhold the employee contribution to both the social security and Medicare portions of the FICA tax. **This applies to government employers as well as private sector employers.**
- 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.

- DOL regulations define an “emergency responder” as follows: “an emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, 101 including the District of Columbia, determines is an emergency responder necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.”

Commentary accompanying the DOL regulations emphasizes that this term will be interpreted broadly. The term does not appear to be limited to positions involved in COVID-related response, but also applies to other work needed to “keep Americans safe with access to essential services” and “ensure the welfare and safety of our communities and of our Nation.”

- DOL regulations define “health care provider” to include “anyone employed at any doctor’s office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is 100 otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.”

- Uncertainty Regarding Obligations of Potential Exemption for 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.~~ DOL regulations provide that any employer with fewer than 50 employees is exempt from providing Emergency Paid Sick Leave and/or PHEL/FMLA leave if doing so "would jeopardize the viability of the business as a going concern." To claim this exemption, an authorized officer of the business must determine that: (i) providing the leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; (ii) granting leave to an employee or employees would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or (iii) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and the labor or services are needed for the small business to operate at a minimal capacity. This exemption appears to be limited to private businesses, as well as religious and nonprofit organizations, and does not appear to be available for small public employers.

- Documentation. DOL regulations state that an employee seeking PHEL/FMLA or EPSL leave must provide the employer with documentation containing: (i) the employee's name; (ii) date(s) for which leave is requested; (iii) qualifying reason for the leave; and (iv) an oral or written statement that the employee is unable to work due to the qualifying reason. For PHEL/FMLA leave or where EPSL is used to care for a child due to a school closure or the unavailability of a child care provider, the employee must also provide: (v) the name of the son or daughter being cared for; (vi) the name of the school, place of care or childcare provider that has closed or become unavailable; and (vii) a representation that no other suitable person will be caring for the child during the period for which the employee is taking leave. The regulations further provide that an employer may require the employee to provide materials as needed to support a request for tax credits under the FFCRA (applicable only to private sector employers). The IRS has issued guidance indicating that to support a tax credit, the employee's written request for leave due to a school closure or unavailability of child care provider should include the name and age of the child(ren) to be cared for; the name of the school or childcare provider that is closed or unavailable; a representation that no other person will be providing care while the employee is receiving FFCRA benefits; and if the child needing care is older than 14 and the care is during daylight hours, a statement that "special circumstances" exist requiring the employee to provide care. The IRS guidance is available here: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.

## **Emergency Paid Sick Leave**

This section of the new law requires employers to provide up to 10 days of Emergency Paid Sick Leave (EPSL) 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. **Please see the DOL's definitions for health care providers and emergency responders above.**
- **Covered Reasons for Using Paid Sick Leave**: Employees are entitled to use EPSL 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. **DOL regulations provide that “a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them.” Note that eligibility requires that the employee be unable to work or telework because of a “stay home” governmental order. If an employee is able to telework, or if an employee is exempt from the order by virtue of providing essential services, the employee would not be entitled to EPSL for this reason.**
  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.~~ Per DOL regulations “individual” means an employee’s immediate family member, a person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, “individual” does not include persons with whom the employee has no personal relationship.
  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 EPSL. 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.
  - Intermittent Use. If an employee is either (1) teleworking or (2) is not teleworking but is absent to care for their child whose school or place or care is closed because of COVID-19, then the employee may take EPSL intermittently as long as the employer agrees to allow it. If an employee is not teleworking and taking EPSL for any other qualifying reason, the employee is prohibited from intermittent use, including less than full-day increments. Such an employee is required to continue using EPSL every day until the employee exhausts their EPSL or the employee no longer has a qualifying reason for taking EPSL. As the DOL explained, “[T]he intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.” If an employee has EPSL remaining after their use, they may use any remaining EPSL later if another qualifying reason occurs.

- 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, as noted above, 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.

While an employee is receiving two-thirds of regular pay during EPSL leave, the employer and employee may agree to allow the employee to supplement the EPSL benefit with accrued leave. An employer may not require supplementation with accrued leave. Although the DOL clearly recognizes an employer's right to deny supplementation with accrued leave, it is not yet known whether the Washington Department of Labor & Industries will take the position that employees have the right to use Washington Paid Sick Leave to supplement the EPSL benefit. If a private employer allows supplementation with accrued leave or otherwise keeps employees in fully-paid status, the FFCRA tax credit would be limited to the benefits required under the FFCRA.

- Use of Paid Sick Leave; Sequencing with Other Leave. Employees will be entitled to access EPSL immediately, regardless of how long they have been employed with the employer. Employees may access EPSL 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 EPSL. ~~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 could 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.

- Documentation. DOL regulations state that an employee seeking PHEL/FMLA or EPSL leave must provide the employer with documentation containing: (i) the employee’s name; (ii) date(s) for which leave is requested; (iii) qualifying reason for the leave; and (iv) an oral or written statement that the employee is unable to work due to the qualifying reason. Depending on the type of leave being requested, DOL regulations require that an employee provide the following additional information to substantiate the leave request:
  - Where ESPL is requested due to a quarantine or isolation order, the name of the government entity issuing the order;
  - Where EPSL is requested due to the recommendation of a health care provider to self-quarantine, the name of the health care provider making the recommendation; or
  - For PHEL/FMLA leave or where EPSL is used to care for a child due to a school closure or the unavailability of a childcare provider, the employee must also provide:
    - the name of the son or daughter being cared for;
    - the name of the school, place of care or childcare provider that has closed or become unavailable; and
    - a representation that no other suitable person will be caring for the child during the period for which the employee is taking leave.

The regulations further provide that an employer may require the employee to provide materials as needed to support a request for tax credits under the FFCRA (applicable only to private sector employers). The IRS has issued guidance indicating that to support a tax credit, the employee’s written request for leave due to a school closure or unavailability of child care provider should include the name and age of the child(ren) to be cared for; the name of the school or childcare provider that is closed or unavailable; a representation that no other person will be providing care while the employee is receiving FFCRA benefits; and if the child needing care is older than 14 and the care is during daylight hours, a statement that “special circumstances” exist requiring the employee to provide care. The IRS guidance is available here:

<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.

- Potential Exemption for Smaller (Under 50) Employers. The exemption for smaller businesses described above in the PHEL/FMLA summary is also applicable to the obligation to provide EPSL.
- Model Notice. Employers are 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](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)). The notice should be posted in a conspicuous place on the employer’s

premises. In recognition that many employees are currently teleworking, the DOL has advised that the posting requirement can be satisfied by emailing or direct mailing this notice to employees, or posting the notice on an employee information internal or external website.

- 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.**
- Employers Do Not Pay the Social Security Portion of the FICA Tax on Wages Paid as EPSL. Paid leave benefits are normally subject to the FICA tax. However, under the FFCRA, employers do not pay the social security portion of the FICA tax with regard to any wages paid out as PHEL/FMLA benefits or EPSL. Employers must still pay the Medical portion of the FICA tax and must withhold the employee contribution to both the social security and Medical portions of the FICA tax. **This applies to government employers as well as private sector employers.**

### **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.*