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March 19, 2020 Publication

COVID-19 Second Relief Package: President Signs Scaled Back Law

COVID-19 Resource

On March 18, the President signed the Families First Coronavirus Response Act (FFCRA). The signed bill scaled back the version of the law that passed the House on March 14.

The FFCRA will take effect on April 2, – fifteen days after it was signed by the President. It contains a number of major provisions concerning paid leave, job protection and tax implications that will affect employers nationwide. The FFCRA “sunsets” on December 31, 2020.

Importantly, the FFCRA only applies to employers with *fewer than 500 employees*. The threshold for coverage is tied to the Fair Labor Standards Act, which means that all but the smallest employers with 500 or fewer employees will be covered. Tax credits are available to help employers defray the costs for paid sick leave, and employers with less than 50 employees may apply for an exemption.

Overview of the Important Points for Employers

Changes to FMLA to Include Paid Leave When Child's School or Child Care Provider is Closed

FMLA Protections. The bill expands FMLA and provides paid leave for “Qualifying need related to a public health emergency.”

- **Covered Employers.** This law covers employers with *fewer than 500 employees*.
- **Reduced Threshold for Eligible Employees.** Employees are eligible to receive leave from an employer if they have been employed by that employer for at least 30 calendar days. This is lower than the general FMLA threshold of 12 months and 1250 hours worked.
- **Qualifying Need Related to a Public Health Emergency Defined.** Eligible employees will have the right to take up to 12 weeks of FMLA to care for a child under 18 years old if the child's school or place of care has been closed, or the paid childcare provider is unavailable due to a public health emergency; ***provided that the employee is unable to work or telework.***
- **Job Protection.** FMLA job protections still apply, but employers with less than 25 employees do not have to return the employee to the previous position if that position no longer exists but must make reasonable efforts to place the employee into an equivalent position.

Paid FMLA Leave.

- **Limited to certain circumstances.** Paid leave only applies to “qualifying needs related to a public health emergency.” Other FMLA leave remains

unpaid.

- **First 10 days.** The first 10 days of leave may be unpaid but employees can choose to use accrued paid leave.
- **Subsequent Leave Paid at Two-Thirds of the Regular Rate.** The leave must be paid at no less than two-thirds of the employee's regular rate of pay (note that this may be greater than an employee's *hourly* rate, see [the Department of Labor's regular rate guidance](#) for more information) The daily rate of paid leave cannot exceed \$200, and aggregate leave shall not exceed \$10,000.
- **Calculating Number of Hours.** Generally, employers must use the number of hours the employee would otherwise be normally scheduled to work. Special rules apply, however, for employees with varying schedules.
- **Mandatory Substitution Prohibited.** Employers cannot require employees to use other paid leave in lieu of leave granted under the FFCRA.

Exemptions. The US Department of Labor will develop rules exempting certain healthcare providers and emergency responders from taking leave under the bill. Rules will also exempt businesses with fewer than 50 employees from the requirements of the bill if it would jeopardize the viability of the business.

Federal Paid Sick Leave (PSL)

Qualified PSL Reasons. Employers with *fewer than 500 employees* must provide all employees with PSL when an employee is unable to work (*or telework*) due to a need for leave because of the following six reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolate 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 an order as described in reason 1 (above) or has been advised as described in reason 2 (above);
5. The employee is caring for their child if the school or childcare has been closed, or the childcare provider is unavailable, due to COVID-19; or
6. The employee is experiencing any other substantially similar COVID-19 condition as specified in rules from the Department of Health and Human Services.

Amount of PSL. Full-time employees are entitled to up to 80 hours of PSL. For part-time employees, they are entitled to a pro-rata share of hours worked, on average, over a 2-week period.

PSL Payments. PSL will be paid at the regular rate of pay for reasons 1, 2 or 3 (above). PSL for reasons 4, 5 or 6 (above) will be paid at two-thirds the regular rate of pay.

Daily PSL Payments and Caps. Employers provide PSL based on the number of hours the employee would otherwise be normally scheduled to work. However, the FCCRA sets caps of \$511 per day (and \$5110 maximum) for PSL taken for reasons 1, 2 or 3 (above), and \$200 per day (and \$2000) maximum for PSL taken for reasons 4, 5 or 6 (above).

No carryover. There is no carryover of PSL from one year to the next.

Eligibility. Paid sick leave under FFCRA shall be provided regardless of how long the employee has been employed.

Interaction with Existing Paid Leave

Benefits. Employers may not require an employee to use any other type of paid leave before the employee uses PSL under the FFCRA. Thus, employees are entitled to use PSL under the FFCRA prior to using any employer-provided vacation, PTO or paid sick leave under state or local law.

Employer Notice. Employers are obligated to post a PSL notice to employees, and by March 25, 2020, the DOL will provide a model notice.

Multi-Employer CBAs. Employees covered by a multi-employer collective bargaining agreements who receive paid leave benefits from a trust arrangement are entitled to receive leave benefits commensurate with the above requirements.

DOL Rules. The DOL will issue PSL guidelines to assist employers by April 2, 2020.

Non-Discrimination, Non-Retaliation

It shall be unlawful for any employer to discharge, discipline or in another manner discriminate against any employees because they have taken leave provided under FFCRA, or filed any complaint, instituted any proceeding, or testified or is about to testify in any proceeding relating to FFCRA.

Remedies for Violations

Employers are liable for unpaid benefits, liquidated damages of 100%, injunctive relief, fines of up to \$10,000 along with criminal penalties, and attorney's fees for a violation of the FFCRA.

Unemployment Compensation, Coverage for COVID-19 Testing

FFCRA provides for increased funding for state unemployment programs and requires a waiver of co-pays for COVID-19 testing by health care plans and insurers.

Tax Considerations

Employers required to pay workers can offset some of the financial impact through refundable employment tax credits. The tax credit equals 100 percent of qualified sick leave and qualified paid FMLA paid by employers. A credit would also be available for self-employed taxpayers.

Credits for both qualified sick leave and qualified family leave wages are subject to caps. The credit for qualified sick leave is limited to \$511 per day for employees when an employee is taking care of themselves or \$200 per day for employees caring for a family member – both with an aggregate cap of ten days. This effectively caps the qualified sick leave credit between \$2,000 and \$5,110 per employee. The credit for qualified FMLA wages is limited to \$200 per day and \$10,000 aggregate for any employee. The FFCRA would prevent double benefits by increasing an employer's gross income by the amount of credits received (*i.e.*, the payroll credit is offset by an equal income item which results in a net-zero effect on taxable income, though of course the credit is more valuable than the income tax deduction). It would also prevent a credit for wages where a credit is allowed under section 45S (employer credit for paid family and medical leave).

The FFCRA leaves out many details. These may be covered through future regulations issued by the Internal Revenue Service. One important detail is what happens when businesses lack cash to pay employees for payments subject to the refundable credit. According to the [Wall Street Journal](#), "Treasury

Secretary Steven Mnuchin has said the government is prepared to advance the funds to businesses that can't cover the costs now." The budgetary impacts of the FFCRA would not impact budget limitations imposed by pay-as-you-go requirements.

HR Considerations

Covered employers should consider implementing COVID-19 policies, which should include a discussion about the interaction with state and local paid sick leave laws. Many states, including Washington, Oregon, and California, already have required paid sick leaves. We recommend working with counsel to prepare a policy that addresses how federal, state, and local sick leaves will interact with existing PTO and vacation policies.

Businesses should also consider the impact of PSL on businesses that close due to lack of work or because of a state or local order to close non-essential businesses. There is no question that businesses and employees are facing significant impact because many people are self-isolating or quarantined. As written, the FCCRA does not cover employees who are sent home by their employers due to a COVID-19 related decrease in business. But it may cover employees who are sent home due to a "shelter-in-place" or related order public health order. Again, we recommend working with counsel to discuss your businesses' individual circumstances.