



EMPLOYER INSIGHTS INTO THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”)

On March 18, 2020 President Trump signed the Families First Coronavirus Response Act (“FFCRA”) to provide relief to employees from economic issues stemming from the COVID-19 pandemic. The FFCRA provides two types of paid leave for employees: Emergency Family and Medical Leave and Emergency Paid Sick Leave.

What Employers need to know:

Emergency Family Medical Leave Expansion Act

The “Emergency Family and Medical Leave Expansion Act,” (“EFMLA”) adds a new job-protected leave entitlement to the Family and Medical Leave Act (“FMLA”). Emergency FMLA entitles an eligible employee to a total of 12 workweeks of leave up until December 31, 2020 if the eligible employee is unable to work or telework in order to care for a son or daughter under 18 years of age if the child’s school or care provider is unavailable due to a public health emergency related to COVID-19. Employees must give their employers notice before taking Emergency FMLA, if possible.

One important feature of EFMLA is that it defines “employer” who must provide EFMLA to employees as an employer with fewer than 500 employees. Note, though, that the Act states that employers who do not employ “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year cannot be sued by an employee for violating EFMLA, but may subject to civil liability in proceedings brought by the Secretary of Labor.

EFMLA gives the Sectary of Labor authority to issue regulations excluding certain health care providers and emergency responders, as well as exempting small businesses with fewer than 50 employees from the Emergency FMLA requirements when the requirements could “jeopardize the viability of the business as a going concern.” No mechanism for claim such an exemption has been provided as of yet.

EFMLA also provides that an eligible employee is one how has been employed for at least 30 calendar days.

The first 10 days of leave taken for the reasons listed above can be unpaid leave, but employees can substitute any accrued paid leave like vacation or sick leave. Other mandated paid leave, such as leave required under the Paid Sick Leave Act, may apply.

After the first 10 days, employers must provide paid leave for each day of Emergency FMLA. Employers are required to provide employees with two-thirds of the employee's regular rate of pay as defined by the FLSA for the number of hours the employee would normally be scheduled to work. Where an employee's schedule varied from week to week such that an employer would be unable to determine the right number of hours with certainty, employers should use a number of hours equal to the average number the employee was scheduled to work over the 6-month period ending on the start date of the employee's leave period, including any scheduled hours for which the employee took any type of leave. For employees who did not work over the 6-months prior to the leave period start date, the employer may use the average number of hours per day that was reasonably expected of the employee at the time of hire. The Act states that in no event shall the paid leave exceed \$200 per day or \$10,000 in the aggregate.

A few practical considerations for employers:

- Employers with fewer than 500 employees must provide Emergency FMLA **and** Paid Sick Leave to employees
- Employers must allow employees to use Paid Sick Leave before any other leave
- Full-time employees get 80 hours of Paid Sick Leave. To qualify for Paid Sick Leave:
 - The employee must be subject to federal, state or local quarantine/isolation due to COVID-19;
 - The employee must be complying with a recommendation or order by a health care provider to self-quarantine due to concerns related to COVID-19;
 - The employee is obtaining medical care while experiencing symptoms of COVID-19; or
 - The employee needs to care for the employee's child if the child's school or place of care has been closed, or the child's care provider is unavailable, due to COVID-19.
- Employers who do not meet the standard threshold of "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" are not subject to civil actions by employees for violation of Emergency FMLA, but can be held civilly liable to the Secretary of Labor.
- Employees who have worked for the employer for 30 or more calendar days are eligible for Emergency FMLA
- Employers with fewer than 25 employees do not have to reinstate an employee after Emergency FMLA if:
 1. the employee takes Emergency FMLA; and

2. the position the employee held at the time the leave started does not exist due to economic conditions or other changes in operations that affect employment and are caused by a public health emergency during the period of leave; and

3. the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; and

4. if the reasonable efforts to restore the employee fail, the employer makes reasonable efforts to restore the employee for a 1-year period beginning on the earlier of the date on which the employee's qualifying need for Emergency FMLA arises or the date that is 12 weeks after the start date of the employee's Emergency FMLA period.

If all of these conditions are met, the reinstatement requirement will not apply to the employer.

- Both Emergency FMLA and Paid Sick Leave provide leave for closure of a child's school or care facility if the child is under 18
- Both Emergency FMLA and Paid Sick Leave take effect no later than April 2, 2020
- Emergency FMLA provides 12 weeks of job-protected leave for the employee's use due to certain conditions: the eligible employee is unable to work or telework due to leave needed to care for a son or daughter under 18 years of age if the child's school or care provider is unavailable due to a public health emergency with respect to COVID-19
- The first 10 days of Emergency FMLA can be unpaid. Employees may elect to use accrued paid leave, but employers cannot force them to do so. After the first 10 days of Emergency FMLA leave, the remainder of the leave period is paid.
- For employees whose work schedule varies week to week, employers can calculate the appropriate number of leave hours by taking the average number of hours worked per week during the 6 months before the employee is to start leave for both Emergency FMLA and Paid Sick Leave. Note that the 6-month lookback period applies only for part-time employees under Paid Sick Leave.
- Part-time employees receive Paid Sick Leave equal to the number of hours they work, on average, over a 2-week period
- Employees receive only 2/3 for Emergency FMLA and Paid Sick Leave for care of family members

