

The Employer's New Obligations Under the Families First Coronavirus Response Act

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President Trump signed the Families First Coronavirus Response Act (“FFCRA”) the evening of March 18, 2020. There is much to digest but the following are new obligations that employers must address. The FFCRA contains leave provisions applicable to private employers with fewer than 500 employees and some government employers. The FFCRA becomes effective 15 days from enactment, or April 2, 2020 and expires on December 31, 2020.

Emergency Family and Medical Leave Expansion

Qualifying Leave for Public Health Emergency

Employees are entitled to up to 12 weeks of leave for a “qualifying need related to a public health emergency.” This is a temporary addition to the existing Family and Medical Leave Act (“FMLA”). Qualified need related to a public health emergency exists when:

1. an employee “is unable to work (or telework)” due to a need to care for his or her children, under age 18, if the children’s school or place of care has been closed; or
2. the children’s child care provider is unavailable due to an emergency with respect to COVID-19 declared by federal, state and/or local government.

This leave applies to all employees who have been employed for 30 calendar days and includes businesses with fewer than 50 employees who are not otherwise covered by the existing FMLA.

Payment

The first 10 days of this leave can be unpaid. Employers can require employees to substitute any of their accrued vacation or sick time during the unpaid portion of their leave, but employees cannot be required to use such paid time during the remainder of the emergency leave. After the first 10 days, employees will be paid 2/3 of the employee’s usual pay with a cap of \$200 per day and a cap of \$10,000 in total.

Reinstatement

Employers must reinstate employees who take public health emergency leave to their previous position or an equivalent position upon their return from leave. There is a relaxation of this requirement in certain circumstances for employers who employ fewer than 25 employees. These smaller employers do not need to reinstate an employee to his or her job following public health emergency leave if:

1. the position held by the employee when the leave commenced no longer exists due to economic conditions or other changes in the employer’s operating conditions:
 - i. that affect employment; and
 - ii. are caused by a public health emergency during the period of leave.
2. the employer makes “reasonable efforts” to reinstate the employee to an equivalent position; and

3. if the employer's "reasonable efforts" fail, the employer makes "reasonable efforts" to contact the employee if an equivalent position becomes available during the following year.

Emergency Paid Sick Leave

Reasons

Employers must provide employees with two weeks of paid sick leave, paid at the employee's regular rate. Eligible employees are those who are unable to work or telework as a result of a need for leave arising because:

1. the employee is subject to a quarantine or isolation order related to COVID-19 (Quarantine); or
2. the employee has been advised by a health care provider to self-quarantine due to COVID-19 (Advised Quarantine); or
3. the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis (Symptoms); or
4. the employee is caring for an individual who is subject to an order as described in subparagraph 1 or has been advised as described in subparagraph 2 (Caring for Individual); or
5. the employee is caring for a child if child's school or child care has been closed or the child care provider is unavailable due to COVID-19 precautions (Closure of Child Care); or
6. the employee is experiencing any other substantially similar conditions specified by the Secretary of Health and Human (Other).

Amount of Leave

Full-time employees are entitled up to 80 hours of emergency paid sick leave. Part-time employees are entitled to an amount of emergency paid sick leave based on the average number of hours they work over a two week period. All employees are covered regardless of how long they have been employed. The total amount that must be paid for employees who are taking emergency paid sick leave: for Quarantine, Advised Quarantine or Symptoms can be capped at \$511 per day and \$5,110 in the aggregate. Every employee who takes emergency paid sick leave because of Caring for Individual, Closure of Child Care or Other is to be paid at a rate of compensation no less than 2/3 of their regular rate of pay, up to a cap of \$200 per day and \$2,000 in the aggregate.

Other Terms

The emergency paid leave is in addition to any other paid time off the employer may already offer to their employees. Employers cannot require employees to exhaust any of their employer-provided leave time before taking emergency paid sick leave time under the FFCRA. Also, employers cannot require employees to find a replacement employee during their absence.

Covered employers must post and keep posted, in conspicuous places, a notice to be provided by the Department of Labor discussing these leave requirements.

Tax Credits

Payroll Credit for Required Emergency Paid Sick Leave. There will be a refundable tax credit equal to 100 percent of qualified paid sick leave wages paid by an employer for each calendar quarter. The tax credit is allowed against the employer portion of Social Security taxes. Qualified sick leave wages are wages required to be paid pursuant to the FFCRA. There is a distinction between qualified sick leave wages paid with respect to employees who must take leave because of Quarantine, Advised Quarantine or Symptoms. For amounts paid to those employees, the credit is the lesser of the daily wage or \$511 per day. For amounts paid to employees on leave because of Caring for Individual, Closure of Child Care or Other, the amount of qualified sick leave wages taken into account for each employee is capped at \$200 per day.

If the credit exceeds the employer's total Social Security tax liability for all employees for any calendar quarter, the excess credit is refundable to the employer.

Payroll Credit for Required Paid Family Leave. This section provides a refundable tax credit equal to 100 percent of qualified family leave wages paid by an employer for each calendar quarter. The tax credit is allowed against the employer portion of Social Security taxes.

The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters of 2020. If the credit exceeds the employer's total liability for all employees for any calendar quarter, the excess credit is refundable to the employer.

The section applies only to wages paid with respect to the period beginning on a date selected by the Secretary of the Treasury, which is during the 15-day period beginning on the date of the enactment of this Act, and ending on December 31, 2020.

Special Rule Related to Tax on Employers. Wages required to be paid by reason of Emergency Paid Sick Leave and Emergency Family and Medical Leave Expansion provisions will not be considered wages for purposes of Social Security taxes.

Other

The FFCRA does not prohibit an employer from terminating employees because of reduction or cessation of business. It does prohibit an employer from discriminating against employees who are taking any paid leave provided by this new legislation, or laying off employees in anticipation of the effective date of the FFCRA.

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