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The Families First Coronavirus Response Act – What We Know Now

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On March 18, 2020, the President signed HR 6201, the Families First Coronavirus Response Act (Act or FFCRA) into law. Since then, the Department of Labor (DOL) has issued, and reissued, guidance on multiple occasions, sometimes even changing previous advice.

The latest DOL advice includes:

- A Fact Sheet for Employers and
- A Question and Answers document

Based on this guidance, the following is what we know now. This information supersedes any prior releases that we have distributed on this topic. Of course, this is only the latest. Please keep in mind that this summary is not necessarily exhaustive of all areas in the DOL's FAQs and that additional guidance from the DOL could be forthcoming. You should therefore monitor and review the above links and consult with legal counsel for updates and guidance on implementation specific to your business.

What is the Effective Date of the Act?

The Act will become effective on April 1, 2020.

What do I Have to Post and How do I Post It?

The DOL published the poster employers are required to post which explains the requirements of the Act. You will need to post it in the workplace and email or mail the poster to those working remotely as more fully set forth in the below Q&A.

- Click here for the poster
- Click here for a Q&A regarding the poster

Is My Business Covered Under the FFCRA?

The FFCRA's paid sick leave and expanded family and medical leave provisions apply to private employers with fewer than 500 employees (and others not relevant here).

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

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Employers with joint operations or more than one company should review the DOL's FAQs and consult with counsel to determine if they meet the fewer than 500 threshold.

This standard means essentially that, to take advantage of these new paid leave benefits and their tax credits, you would have to maintain the fewer than 500 threshold throughout the entirety of the effective date of this law, or until December 31, 2020.

I Have a Small Business – Is My Business Exempt from the FFCRA?

The small business exemption has not yet been fully developed. Based on current guidance, it appears that employers with fewer than 50 employees may only be subject to a partial exemption from having to provide (a) paid sick leave due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern.

A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business' expenses and financial obligations exceeding available business revenues, and cause the small business to cease operating at a minimal capacity;

2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business or responsibilities; or

3. 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Are There Other Exempt Businesses or Employees?

Those businesses with 500 or more employees are exempt.

Federal employees are not likely entitled to these leave benefits under the FFCRA (although other public employees likely are subject to the FFCRA).. Further, health care providers and emergency responders may be excluded by their employer from being able to take expanded family and medical leave under the Act. These coverage limits also apply to public-sector health care providers and emergency responders. Health care providers and emergency responders are defined in more detail in FAQs 56 and 57.

Federal employees or private or public health care providers or emergency responders should seek guidance from their respective employers as to eligibility to use these benefits.

How Do I Calculate the Rate of Pay for the New Leave Benefits that are Explained Below?

For purposes of the new paid leave benefits, the regular rate of pay used to calculate an employee's paid leave is the average of the employee's regular rate over a period of up to six months prior to the date on which the employee takes

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leave. If the employee has not worked for you for six months, the regular rate used to calculate the paid leave is the average of the employee's regular rate of pay for each week the employee has worked for you. If an employee is paid with commissions, tips or piece rates, these wages will be incorporated into the above calculation.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and dividing that sum by all hours actually worked in the same period.

Also, for the emergency FMLA benefits, keep in mind that if an employee regularly worked overtime, then the number of hours compensated for must take this overtime into account and they must be paid for all hours regularly scheduled to work. That said, the new paid sick leave is limited to 80 hours in two weeks for full-time employees, as set forth below.

What Happens to Employee Health Benefits While Using These New Benefits?

Health benefits must be continued during any paid sick leave.

Health benefits must also be continued during any emergency FMLA leave under the same conditions as if actively employed.

How Do These New Benefits Work with Existing Paid Leave Benefits?

The new paid leave benefits are in addition to any sick leave/PTO/vacation which you already provide to your employees, including any newly adopted policies on such benefits which were adopted prior to April 1, 2020. Therefore, your eligible employees would have the 80 hours of paid sick leave added on to whatever their available balance is as of April 1, 2020. The same holds true for the paid emergency FMLA leave—those benefits are in addition to any other paid leave benefits existing prior to April 1, 2020. This also means that you cannot deny an employee paid sick leave under the new paid leave benefits, even if you gave employees paid leave for a reason identified in the new federal paid leave benefits prior to April 1, 2020.

Further, because some of the pay under the new leave benefits is only at two-thirds of an employees' regular rate of pay, you can allow, but not require, an employee to supplement that two-thirds pay under the new benefits with any existing leave benefit (e.g., vacation, sick leave), so that the employees are paid the equivalent, in total, of their normal wages. There are no tax credits for these amounts provided by the existing leave benefits; the tax credits only apply to the amounts paid under the new federal sick leave or emergency FMLA benefits, and no more.

Please note that you cannot require an employee to use existing leave benefits in order to use, or to supplement, the new paid leave benefits. The employee can choose to do so, however.

How Does the New Emergency FMLA Benefit Work With Existing FMLA?

First, FMLA generally only allows a total of 12 workweeks of leave (military caregiver may be 26 weeks) in a 12-month period that you should have defined in your policies. So if your employee previously exhausted that 12 weeks for the appropriate 12 month period (depending upon which one you use for FMLA purposes), then that employee is not entitled to any emergency FMLA leave. If the employee only previously exhausted part of that FMLA leave, such as six

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weeks, then they would be entitled to the remaining six weeks under emergency FMLA (or other leave) for a qualifying reason.

Further, this new emergency FMLA benefit, which is only for leave taken because the employee must care for a child whose school or place of care is closed, or whose childcare provider is unavailable, due to COVID-19 related reasons, is the only FMLA leave that is paid; all other FMLA leave remains unpaid.

What Happens if I Closed My Business, Whether Before April 1, 2020 or After April 1, 2020—Do I Still Offer These Benefits?

If you sent, or send, your employees home and did/do not pay them because there was/is not enough work, those employees will not get paid sick leave or emergency FMLA leave.

If you close after April 1, 2020 while the employee is on paid sick leave or the emergency FMLA, you must pay them for any benefits used before the closure, but there is no entitlement to such benefits after closure. This is true whether you closed your worksite for lack of business or because you were required to close pursuant to a Federal, State or local directive. This is also true whether the closure is temporary or not.

Under these circumstances employees may be eligible for unemployment insurance benefits. Please see the following link for more information about unemployment: https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

What Happens if I Keep My business Open But Furlough Employees?

Those employees furloughed because there is not enough work or business are not entitled to then take paid sick leave or emergency FMLA leave. However, the employees may be eligible for unemployment insurance benefits. Please see the following link for more information about unemployment: https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

What Happens if I am Closed but Have Essential Employees Still Working, Whether Onsite or at Home (i.e., teleworking)?

While not entirely clear as the new DOL guidance does not squarely address this situation, it appears any employee not working because there is/was not enough work will not be eligible for benefits. For those employees where there is work available for them to work, whether from home or onsite, then they are not eligible unless they then cannot work because of a qualifying condition/reason in 2-6 set forth below (and not all qualifying conditions in 2-6 will mean they cannot work). See FAQs 18-19 as an example.

What Happens if I Keep My Business Open But Reduce the Hours of Employees?

Those employees whose hours are reduced because there is not enough work or business are not entitled to then take paid sick leave or emergency FMLA leave. However, the employees may be eligible for unemployment insurance benefits. Please see the following link for more information about unemployment: https://www.edd.ca.gov/about_edd/coronavirus-2019.htm.

For entitlement to paid sick leave or emergency FMLA leave in situations where there are reduced hours, employees may need to apply for the Unemployment Insurance Work Sharing Program through the EDD:

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https://www.edd.ca.gov/Unemployment/Work_Sharing_Program.htm

Are the New Paid Leave Benefits Retroactive?

No, the new paid leave benefits are not retroactive. They only apply starting April 1, 2020. There will be no tax credits for any benefits voluntarily provided prior to April 1, 2020.

What Are The New Federal Paid Sick Leave Benefits?

Effective dates: April 1, 2020 to December 31, 2020. There is no carryover of any unused sick leave to the next year.

Amount of paid sick time: Up to 80 hours for full-time employees. Part-time employees may receive the amount of time based upon a two-week average number of hours. The FAQs answer more questions about how to calculate this two-week average if schedules vary (see FAQ 5). They also answer questions about whether leave can be taken intermittently (see FAQs 20-22).

Paid sick leave can be used in the following circumstances:

1. If an employee is unable to work (or telework) due to a need for leave because…

    1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19 (not only a stay at home order).

    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 or self-quarantine as described above.

    5. The employee is caring for a son or daughter whose school or childcare is closed/unavailable due to COVID-19.

    6. The employee is experiencing “any other substantially similar condition” specified by the U.S. Department of Health and Human Services.

The paid sick leave is compensated at the employee’s normal rate of pay for qualifying reasons 1, 2 or 3 above. Capped at $511 per day and $5,110 in the aggregate per person for qualifying reasons 1, 2 or 3.

The paid sick leave is compensated at two-thirds the employee’s regular rate of pay for qualifying reasons 4, 5 or 6. Capped at $200 per day and $2,000 in the aggregate per person for qualifying reasons 4, 5 or 6.

Employees should give reasonable notice of the need for this leave.

Employers cannot require an employee to exhaust other leave first or find a replacement to use this leave. Employers cannot retaliate against an employee for using this leave.

What Is The New Federal Emergency FMLA Benefit?

Effective dates: April 1, 2020 to December 31, 2020.

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Amount of leave: Up to 10 weeks of paid FMLA leave calculated at two-thirds the employee's regular rate of pay where an employee, who has been employed for at least 30 calendar days before the date requested for leave (including any period of temporary employment), is unable to work due to a bona fide need for leave to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19. This pay generally occurs after the employee has first been paid the new federal sick leave for two weeks at two-thirds the regular rate of pay (if taken for the same reason, e.g., to care for a child due to school/childcare closure and/or unavailability). The employee could, however, elect to use any other available paid leave benefits during this time. For example, if they have vacation or preexisting paid sick leave, they could take this time off which is usually paid at 100% rather than two-thirds. The pay under emergency FMLA is capped at $200 per day or $10,000 in the aggregate per employee.

The pay at two-thirds the regular rate is based on the number of hours the employee is normally scheduled to work. If an employee's schedule is varied, then the "normal hours" are based on the average of the hours worked during the last six months.

Employees should provide notice of the need for this leave as soon as practicable. You can also require that they provide certification of the need for this leave. You should designate the leave and inform employees of their leave entitlements and balances as part of that designation just like you would with any other FMLA leave.

The FAQs clarify that an employee only gets a maximum of twelve weeks off paid through the new federal leave benefits to care for the child whose school or childcare provider is closed or the childcare provider is unavailable. The twelve weeks would be under the new emergency FMLA benefit, and the first two weeks would generally be paid through use of the new paid sick leave benefit, as set forth above.

I Heard There are Tax Credits For the Paid Benefits; is that True?

Although certain areas remain to be clarified by the federal government, at this point it appears that you will be able to seek reimbursement for these paid leave benefits provided beginning April 1, 2020, as well as for health insurance maintained during the time the benefits are provided, via retaining payroll taxes. This would include amounts normally remitted to the government for federal income taxes, the employee share of the Social Security and Medicare taxes and the employer share of the Social Security and Medicare taxes. They have also stated that if there are not sufficient payroll taxes to cover the cost of qualified sick leave, employers will be able to file a request for an accelerated payment from the IRS.

The Internal Revenue Service (IRS) has issued this notice and this announcement about the tax credits. Additional guidance is likely forthcoming.

Examples:

If an eligible employer paid $5,000 in sick leave and is otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees, the employer could keep up to $5,000 of the $8,000 of taxes it was going to deposit and use it to pay for qualified leave payments. Under the law the employer would only be required to deposit the remaining $3,000 on its next regular deposit date.

If an eligible employer paid $10,000 in sick leave and was required to deposit $8,000 in taxes, the employer could use the entire $8,000 of taxes to make qualified leave payments and then file a request for an accelerated credit for the remaining $2,000.

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What Kind of Documentation Do I Need to Claim the Tax Credits?

If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or emergency FMLA, you should retain appropriate documentation in your records. You should consult applicable IRS forms, instructions and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. As of the date of this release, it does not appear that the IRS has yet issued these forms, instructions and information.

If one of your employees takes emergency FMLA leave to care for his or her child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19, you may also require your employee to provide you with any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school or daycare website, or published in a newspaper, or an email from an employee or official of the school, place of care or childcare provider.

Please also note that all existing certification requirements under the FMLA remain in effect if an employee is taking leave for one of the existing qualifying reasons under the FMLA. For example, if an employee takes leave beyond the two weeks of the new paid sick leave because of a medical condition for COVID-19-related reasons which rises to the level of a serious health condition, the employee can be required to provide medical certifications under the FMLA if such certifications are normally required by you to use FMLA for other serious health conditions.

When is the DOL Going to Enforce the Law and What Are the Penalties if I Don't Get it Right?

The DOL will observe a temporary period of non-enforcement for the first 30 days after April 1, 2020, or until May 1, 2020, so long as the employer has acted reasonably and in good faith to comply with the new laws. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful and the DOL receives a written commitment from the employer to comply with the law in the future.

Employers in violation of the first two weeks paid sick time or unlawful termination provisions will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. These are generally lost wages, liquidated damages in an amount equal to the lost wages, interest, attorneys' fees and costs and possible penalties of $1,100 or more for each violation, as well as criminal penalties if convicted.

Employers in violation of the provisions providing for up to an additional 10 weeks of paid leave to care for a child whose school or place of care is closed (or childcare provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act, which could include the same as listed above as well as punitive and emotional distress damages, among others. To avoid these potential damages and penalties, please comply with the new paid leave provisions!

This is Quite a Lot of Information; Is there More?

There are other FAQs that are not discussed in detail here and the FAQs may be subject to additional change. Please monitor the FAQs which again, can be found at the following link: https://www.dol.gov/agencies/whd/pandemic/ffcra-

questions. Also the IRS, as mentioned, will be publishing additional guidance on the small business exemption and the tax credits. The following is a link to the IRS' coronavirus site on which, hopefully, these publications will be announced: https://www.irs.gov/coronavirus.

Please contact your employment counsel for more advice on how these benefits work with your business or with any other questions.

This publication is general in nature and is not intended to replace professional legal advice. Questions regarding specific matters or circumstances should be discussed with legal counsel.

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