

Families First Coronavirus Response Act: Paid Sick Day Mandate and Expanded FMLA Protections for Employees of Small Employers

March 19, 2020

On March 18, 2020, the United States Congress approved, and President Trump signed into law, the Families First Coronavirus Response Act (the “FFCRA”) in response to the global COVID-19 pandemic. In addition to guaranteeing free testing, expanding food security initiatives, enhancing unemployment insurance and increasing federal Medicaid funding, the FFCRA requires government employers and private sector employers with fewer than 500 U.S.-based employees (thereby picking up employers who previously did not meet the coverage thresholds) to provide paid sick leave and enhanced Family Medical Leave Act protections for employees impacted by the virus, as more fully described below. The House Appropriations Committee specifically addressed the exclusion from these amendments of larger employers, stating that Congress did not seek to implement universal paid sick leave, and that small- and medium-sized businesses would not be disadvantaged because the FFCRA provides that although the employer bears the cost up front, the employer also receives a tax credit within the quarter against FICA taxes due from the employer in the quarter equal to the full amount of the cost of providing the mandated benefits.

If you have any questions concerning this memorandum, please reach out to your regular firm contacts in the [Executive Compensation and ERISA](#) group or contact our COVID-19 task force by [clicking here](#).

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Emergency Paid Sick Leave

- **Covered Employers.** Private sector employers with fewer than 500 U.S.-based employees and local, state, and federal government employers.
- **Covered Employees.** Employees who are unable to work (including by working remotely) as the result of their need to (i) quarantine or isolate under a federal, state or local order relating to COVID-19, (ii) quarantine or isolate as the result of a health care provider’s advice relating to COVID-19, (iii) seek a diagnosis because they are experiencing symptoms of COVID-19, (iv) care for an individual who is subject to (i) or (ii), (v) care for a child relating to a school closure or loss of childcare, or (vi) employees experiencing any other substantially similar condition to the foregoing as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.
 - The Secretary of Labor may exclude employers of less than 50 employees if the requirements would jeopardize the business’s ability to remain a going concern and may, or may permit employers to, exclude employees who are health care workers and emergency responders.
 - There is no minimum period in which the employee must have been employed with the employer to qualify, and an employer may not require an employee to search or provide for a replacement during the employee’s absence.
- **Mandated Benefits.** In addition to the regular sick leave benefits, 80 hours of paid leave for full time employees and a number of hours equal to the average of a two week schedule for part-time employees, up to \$200 per day per employee (\$2,000 in the aggregate) who takes the leave to care for a child or other individual subject to a quarantine (the employees described in (iv), (v) and (vi) above in “Covered Employees”) and up to \$511 per day (\$5,110 in the aggregate) for any other employee who is entitled to and takes leave

under these provisions. Employers may not require that employees exhaust their regular sick leave or other paid time off entitlements first. There is no carryover of unused days into a subsequent year.

- **Employer Notice Requirements.** The employer must post a conspicuous notice on the premises of the benefits.
- **Unionized Employees.** Employers of unionized employees may, consistent with their bargaining obligations and the applicable collective bargaining agreement, fulfill their sick leave obligations by making contributions to the applicable multiemployer plan.
- **Effectiveness.** Effective no later than 15 days after enactment through the end of 2020. Employees may not discharge, discipline or discriminate against employees who properly rely on these leave provisions.
- **Violations.** Failure to comply constitutes a violation of minimum wage provisions of the Fair Labor Standards Act of 1938 (the “FLSA”), giving the employee a private right of action for back pay and an equal amount as liquidated damages, plus attorney’s fees and court costs.
- **Tax Credit.** The employer receives a tax credit against FICA taxes due in the quarter for the cost of the mandated benefits.

Emergency Paid Family Leave Under Family and Medical Leave Act of 1993 (“FMLA”)

- **Covered Employers.** Private sector employers with fewer than 500 U.S.-based employees and local and state, and certain federal government employers.
- **Covered Employees.** Employees of at least 30 calendar days who are unable to work (including by working remotely) as the result of needing to care for a child under the age of 18 relating to a school closure or loss of childcare as a result of the

state of emergency declared in response to the COVID-19 virus.

- The Department of Labor may exempt employers of less than 50 employees if the requirements would jeopardize the applicable business's ability to remain a going concern.
- Employers may elect to exclude employees who are health care workers and emergency responders.

— **Employee Notice Requirements.** Where the need for leave is foreseeable, eligible employees must notify the employer as practicable.

— **Mandated Benefits.** Up to 12 weeks of job-protected leave, with limited exceptions applicable to employers of fewer than 25 employees in certain cases of job elimination. While the first 2 weeks (10 days) of any leave may be unpaid, thereafter, the employer must pay at least two-thirds of the employee's usual pay, as determined under the FLSA and with special provisions for those employees with variable schedules, not to exceed \$200 per day and \$10,000 in the aggregate. We note that as the sick leave provisions of the FFCRA supplement these amendments to FMLA, and the employee may have other accrued paid time off entitlements, in some cases an employee will be able to receive their full pay for the first two weeks.

— **Unionized Employees.** Employers of unionized employees may, consistent with their bargaining obligations and the applicable collective bargaining agreement, fulfill their obligations under FMLA by making contributions to the applicable multiemployer plan.

— **Effectiveness.** Effective no later than 15 days after enactment through the end of 2020.

— **Violations.** Failure to comply constitutes a violation of FMLA, pursuant to which an employee may recover up to two times their lost compensation and other actual monetary losses for the FMLA period, be reinstated or promoted, plus receive attorney's fees and court costs.

— **Tax Credit.** The employer receives a tax credit against FICA taxes due in the quarter for the cost of the mandated benefits.

We note that the FFCRA leaves open a number of practical questions regarding their application. For example:

- What, if any, steps do parents have to take to retain or secure alternate child care, and how might one deal with a situation in which both parents are eligible employees under their respective employer's policies and one must decide to stay home while the other works?
- What if any documentation must the employee provide regarding advice from public health officials or health care providers?
- How reasonable does an employee need to be in assessing whether they are exhibiting symptoms?
- How immediate must the risk be to the business's ability to remain a viable going concern and how is that determined?
- What does it mean to post a conspicuous notice on the premises of mandated benefits if employees are working remotely?

If you have any questions or would like to discuss this, or other topics relating to the coronavirus outbreak, further, please do not hesitate to reach out to your regular contacts in the [Executive Compensation and ERISA](#) group or contact our COVID-19 task force directly by [clicking here](#).

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