

The Families First Coronavirus Response Act – What are the New Leave Obligations that Covered Employers must Address?

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “FFCRA”), which was passed by both the House and Senate with overwhelming bipartisan support. The final version of the FFCRA that was enacted does have some changes from the House version that was passed on March 14, 2020.

The FFCRA has a number of provisions, but most applicable to employers are the new obligations on employers with fewer than 500 employees for mandatory paid leave through the Emergency Paid Sick Leave Act, and the requirement of additional leave, both paid and unpaid, under the Family and Medical Leave Act (“FMLA”) for what is referred to as “public health emergency leave.”

The FFCRA contains provisions that employers will receive significant federal tax credits related to the amount of sick leave paid to employees under this law.

The FFCRA takes effect on April 2, 2020 and expires on December 31, 2020.

A summary of the most relevant provisions for employers are as follows:

Emergency Family and Medical Leave Expansion Act

Covered Employers: Significantly, the FFCRA applies to *all* employers with fewer than 500 employees. As a result, even employers with fewer than 50 employees, who previously were not required to comply with the FMLA, will now need to become familiar with and comply with the new leave provisions of the Emergency Family and Medical Leave Act and the notices and documentation required under the FMLA. Employers with under 50 employees are still exempt from the prior provisions of the FMLA.

Eligible Employees: Previously, in order to be eligible for FMLA leave, an employee must have worked for an employer for a minimum of twelve months and 1,250 hours in the prior twelve months. That has not changed for standard FMLA leave. However, for the new public health emergency leave, employees are eligible if they have been employed by their current employer for a minimum of thirty (30) calendar days.

Exceptions to Covered Employers and Eligible Employees: The FFCRA provides the U.S. Department of Labor with the authority to issue regulations “for good cause” to: 1) prohibit “certain health care providers and emergency responders” from taking public health emergency leave; and/or 2) “exempt small businesses with fewer than 50 employees ... when the imposition of [the new leave] requirements would jeopardize the viability of the business as a going concern.” Those regulations have not yet been issued but we anticipate they will be and we will work to update this information as the regulations are issued.

New Leave Requirements: Pursuant to the FFCRA, eligible employees will be able to take up to 12 weeks of “public health emergency leave” in the following circumstance:

1. To care for their child (under age 18) if their child’s school or place of care has been closed, or their child’s child care provider is unavailable, due to a public health emergency.

IMPORTANT NOTE: The bill passed by the Senate and signed into law by President Trump is a change from the House version of the bill that passed on March 14, 2020, which allowed this expanded medical leave for additional reasons related to the employee’s own diagnosis, or need to care for others diagnosed with COVID-19. Those additional reasons are not part of the final FFCRA that has been passed.

Terms of Leave: Another significant change under the FFCRA is that, unlike prior FMLA leave, which was and remains unpaid, the public health emergency leave provides for paid leave.

The first ten (10) days of public health emergency leave can be unpaid. However, as under the prior FMLA, employees can choose to substitute their accrued vacation, sick or PTO leave for this unpaid time, and given the Emergency Paid Leave requirement discussed below, many employees may choose to substitute their new additional Emergency Paid Leave for this period of unpaid leave. Employers cannot require an employee to use paid time during the unpaid portion of the public health emergency leave.

Leave under the prior FMLA was all unpaid leave. Importantly, under the FFCRA, if an employee continues to be eligible for and take public health emergency leave beyond the first ten-day period, covered employers are required to provide the employee with paid leave for the duration of the leave. This paid leave must consist of an amount of pay that is not less than two-thirds of an employee’s “regular rate” of pay (per the FLSA) for “the number of hours the employee would otherwise be normally scheduled to work.” The pay amount is capped at \$200 per day and \$10,000 for the entire leave.

Job Restoration. As under the prior terms of the FMLA, covered employers must restore employees who take this public health emergency leave to their previous position or an equivalent position upon their return from leave. This requirement is relaxed for small employers, who employ fewer than 25 employees. Those employers do not need to restore an employee to his or her job following public health emergency leave if: 1) the “position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer (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 restore 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 Act

Covered employers are required to provide all of their employees with a new amount of paid sick leave through December 31, 2020

Covered Employers: All employers with fewer than 500 employees.

Exceptions. An Employer of an employee who is a health care provider or emergency responder does not have to provide this Emergency Paid Sick Leave. The Act provides the US Department of Labor to create regulations to exempt small businesses with fewer than 50 employees when the provision of the paid leave would jeopardize the viability of the business as a going concern. However, these regulations have not yet been issued.

Eligible Employees: There is no length of service requirement in order for an employee to be eligible.

Amount of Paid Sick Leave. Full-time employees of covered employers are entitled to up to 80 hours of emergency paid sick leave; part-time employees of covered employers are entitled to an amount of emergency paid sick leave up to the average number of hours they work over a two-week period. This paid sick time does not carry over into the year 2021.

This leave is in addition to, any other paid time off the employer already offers to employees. Employers may not require an employee to use other paid leave before they use the paid sick leave provided under the Emergency Paid Sick Leave Act.

Paid Sick Leave Provisions. Employers must provide each employee with paid sick time to the extent that the employee is unable to work due to a need for leave because:

1. The employee is subject to a quarantine or isolation order related to COVID-19 (coronavirus);
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 a COVID-19 quarantine or isolation order or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. The employee is caring for their own child if the school or place of care of the child has been closed or is unavailable due to COVID-19 precautions.

Level of Compensation Required for Paid Sick Leave. This leave is also paid at the employee's regular rate of pay for reasons 1, 2 or 3 above, but is capped at \$511 per day and \$5,110 in the aggregate. For leave taken for reasons, 4, 5 and 6 above the required compensation is two-thirds of the employee's regular rate of pay, capped at \$200 per day and \$2,000 in the aggregate.

Notice Requirements. Covered employers will be required to post and keep posted, in conspicuous places, a notice regarding emergency paid sick leave that the Department of Labor must issue no later than March 25, 2020. The DOL is also due to issue additional guidance to help employers comply with these new requirements.

Blethen Berens recognizes that the FFCRA will impact many of our clients, especially those smaller employers of 50 or fewer employees who did not previously have to comply with the FMLA. The requirements of the FMLA regarding notice and documentation can be complicated. There is a short time-frame for businesses to prepare to be in compliance with the FFCRA. If you have questions about this new law and how to comply with its provisions, questions that are arising due to the impacts of the COVID-19 on your business, or any other employment law issues, please contact one of our employment law attorneys, Julia Ketcham Corbett, Beth Serrill, Silas Danielson, Kevin Velasquez or Alyssa Nelson. We will continue to support you as we all navigate this challenging and uncertain times.