

The Families First Coronavirus Response Act

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The federal Families First Coronavirus Response Act, P.L. 116-127 (“FFCRA”), was signed by President Donald Trump on March 18, 2020. The following questions and answers are aimed at providing guidance on the labor/employment sections of that new law.

1. *What Changes does the FFCRA Make to Existing Labor/Employment Law?*

The FFCRA makes three major changes to existing labor/employment law. The FFCRA:

- Creates a new Emergency Paid Sick Leave benefit for certain categories of designated employees;
- Expands the existing Family Medical Leave Act (“FMLA”) to apply to employers and employees who would not ordinarily be covered by the FMLA through the Emergency Family and Medical Leave Expansion Act; and
- Loosens restraints on Unemployment Compensation benefits and provides emergency funding to the states.

2. *Is that a comprehensive list of the changes?*

No, the FFCRA changes the law regarding coverage for testing for COVID-19, impacts services rendered by the Department of Veterans Affairs, changes provisions of the child nutrition through the National School Lunch Program, affects the Departments of Agriculture, Defense, and Treasury and the IRS, among other changes. However, these changes are beyond the scope of this summary.

GENERAL INFORMATION

3. *Does the FFCRA last forever?*

No, the major provisions of the FFCRA go into effect as of April 2, 2020 and sunsets or expires on December 31, 2020. However, Congress could amend the expiration date, if it so chooses, at some later date.

4. *Are there any exceptions to employer coverage?*

Yes, the FFCRA allows for certain health care providers and emergency responders to opt out of certain portions of the new law. Furthermore, employers with fewer than 50 employees may be excepted at the discretion of the U.S. Department of Labor (“DOL”) when the imposition of such requirements [of the FFCRA] would jeopardize the *viability of the business* as a going concern.

5. *What does the term “viability of the business” mean?*

That term is not defined in the FFCRA, but may be defined in the regulations from the U.S. DOL.

6. *When will the DOL issue those regulations?*

The date of the regulations falls into the “To Be Determined” category.

7. *How can small and medium sized employers afford to pay for the new benefits required to be provided to employees under the FFCRA?*

The FFCRA has a provision for tax credits to assist employers in paying benefits to employees as required under the Act. To help employers pay for these benefits, the law provides a refundable payroll tax credit for 100 percent of qualified paid sick leave wages paid by an employer, which is permitted against the employer's match of Social Security taxes (the 6.2% Old Age, Survivors and Disability Insurance portion). There is also a refundable tax credit for 100 percent of qualified family leave wages paid by an employer, which also is allowed against the employer's 6.2% OASDI portion of Social Security taxes.

For the self-employed, the FFCRA provides a refundable tax credit for 100 percent of qualified sick leave wages for individuals in quarantine for coronavirus, or for 67 percent of qualified wages when caring for a quarantined family member or child whose school or place of care was closed because of coronavirus. This tax credit is allowed against income taxes. There is also a refundable tax credit for family leave for self-employed individuals equal to 100 percent of qualified family leave wages.

8. *What notice must an employer post regarding the FFCRA, if any?*

Employers must post notice of the new law. We anticipate that the DOL will suggest a sample notice on its website in the near future.

9. *As an employer, I operate under a multi-employer bargaining agreement, does that make a difference?*

Yes, there is a special provision applicable to such situations.

10. *Will every employee qualify for either Expanded FMLA benefits or Paid Sick Leave benefits?*

We do not expect every employee to qualify for the benefit. The expanded FMLA benefits will apply to employees who have the Coronavirus, and some who are caring for certain loved ones with the Coronavirus or caring for children due to school or daycare cancellation. The first 10 days of missed work are unpaid; the employer is responsible for payment to the employee after the initial ten-day period as discussed in further detail below. Paid sick leave or PTO from the employer may be used to fund this period. The Emergency Paid Sick Leave will not apply unless the specified conditions are met, as discussed below. However, the Employer may not require use of paid time first for the Emergency Paid Sick Leave.

11. *What are the penalties for violating the provisions of the FFCRA?*

The Expanded FMLA and Paid Sick Leave benefits are actually an amendment to the Fair Labor Standards Act ("FLSA"). Violation of the provisions are considered violations of Section 16 and 17 of the FLSA resulting in the possibility of fines of up to \$10,000 and imprisonment for not more than 6 months or both; injunctions, payment of plaintiff's attorney's fees and costs; payment of back amounts due, liquidated damages, and civil monetary damages of \$1,100 for each violation. As a practical matter, there is also the possibility that the claim triggers a DOL wage and hour investigation, or that plaintiff's counsel seeks to investigate other potential FLSA violations.

EMERGENCY PAID SICK LEAVE

12. *When may an employee qualify for Emergency Paid Sick Leave?*

Private sector employees and many public sector employees may receive that new benefit if they qualify under one of six separate circumstances, namely:

1. If the employee is subject to a Federal, State or local quarantine or isolation order;

2. If the employee has been advised by a health care provider to self-quarantine for COVID-19 purposes;
3. If the employee is experiencing COVID-19 symptoms;
4. If the employee is caring for an individual covered by one of the first three bullets;
5. If the employee is caring for a son or daughter under 18 whose school or day care arrangements have been impacted by COVID-19; or
6. If the employee is experiencing any other substantially similar condition specified by the Secretary of Health in conjunction with the Secretary of the Treasury and the Secretary of Labor.

13. What amount of benefits can an employee receive from Emergency Paid Sick Leave?

This Emergency Paid Sick Leave, providing paid sick leave for 80 hours at the employee's regular rate of pay, is capped at either \$511 per day or \$5,100 in the aggregate or \$200 per day and \$2,000, in the aggregate depending upon the reason for the leave. The higher amount applies to the employee's illness, while the lower amount applies to leave by an employee in order to care for another person with the Coronavirus.

14. Are benefits under the Emergency Paid Sick Leave capped for employees?

Yes, as stated above, benefits under the Paid Sick Leave provision of the FFCRA are capped.

15. Will benefits vary for Full-time and Part-time employees?

Yes, there is sophisticated calculation for varying schedule hours.

16. Does Emergency Paid Sick Leave carry over into the next year?

No.

17. How long does Emergency Paid Sick Leave last?

This leave terminates with the employee's next scheduled work shift immediately following the end of the need for the leave or when the employee reaches the maximum amount specified.

FAMILY MEDICAL LEAVE ACT

18. What impact does the expansion of the FMLA have on employers?

Generally, the original FMLA requires that in certain conditions most public sector employers and private sector employers with 50 or more employees in their workforce and who are engaged in interstate commerce or an industry or activity affecting interstate commerce provide 12 weeks of unpaid leave for its employees. A list of the conditions can be found at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28f.pdf>.

The FFCRA expands the FMLA by requiring all private sector employers involved in interstate commerce with fewer than 500 employees to provide 12 weeks of leave (2 weeks of unpaid leave followed by 10 weeks of paid leave) to all employees in the instance of the Coronavirus. The 50-employee threshold contained in the original FMLA has been removed for determining employee eligibility under the FMLA expansion set forth under the FFCRA. The expanded benefits also apply to most public sector employees. Paid leave will equal 2/3's of the employee's regular compensation.

19. Does "interstate commerce" apply to most private employers?

In this day and age, interstate commerce applies to almost all private sector employers. For example, employers using modern technology, such as computers and teleconferencing, and employers shipping and receiving materials across state lines, generally meet this requirement.

20. How does the FFCRA expand FMLA eligibility for employees?

Generally, an employee would have to work for one year or at least 1,250 hours to be covered under the FMLA. The FFCRA allows employees with 30 days of service to receive benefits under the FMLA under specified conditions.

21. What are the specified conditions needed for employees to receive benefits under the FFCRA?

The expansion act allows benefits for persons who have a qualifying need for a *public health emergency*.

22. What is a public health emergency?

A “public health emergency” is defined as an employee’s inability to work or telework due to the need to care for the son or daughter under 18 years of age of the employee if the school or place of care has been closed or the regular child care provider is unavailable due to a public health emergency.

23. How much Expanded FMLA can an employee take?

An employee may use up to 12 weeks for FMLA leave. The first 10 days is unpaid. After the initial 10-day period, the employer is responsible for paying the employee an amount equal to 2/3’s of the employee’s normal compensation, either based on salary or the hourly rate multiplied by the hours the employee is normally scheduled to work. The amount payable is capped.

24. Will any portion of an absence from work be ineligible for the new benefits?

Yes, as stated above, the FFCRA will not apply to the first 10 days of unemployment. Amounts thereafter under the FMLA portion will vary depending upon the duration of the absence.

25. Are benefits under the FMLA portion of the FFCRA capped for employees?

Yes, benefits under the expanded FMLA portion of the new law are capped at \$200 per day or \$10,000 in total for an affected employee.

26. Will benefits vary for Full-time and Part-time employees?

Yes, there is sophisticated calculation for varying schedule hours.

27. Can an employee take FMLA leave for his/her own Coronavirus infection?

An employee can, under the current FMLA, take FMLA leave for his/her own “serious health condition.” An employee with Coronavirus would be eligible under that provision.

28. What is a “serious health condition”?

A “serious health condition” is a condition that makes the employee unable to perform the functions of his or her job. An employee is “unable to perform the functions of the position” where the health care provider finds that the employee is unable to work at all, or is unable to perform any one of the essential functions of the employee’s position. An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable

to perform the essential functions of the position during the absence for treatment. See DOL Fact Sheet FS28 F at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28f.pdf>.

29. Are employees entitled to job restoration following use of the expanded FMLA benefits?

Both yes and no. Employees are entitled to reinstatement generally, but there is an exception if the position does not exist due to economic conditions or other changes in operating conditions of the employer, and the employer makes a reasonable effort to restore the employee to the job. No reinstatement is guaranteed if the employer has fewer than 25 employees. There is also a one-year “contact period” for the employer to contact the employer about possible job restoration.

UNEMPLOYMENT COMPENSATION

30. What are employees to do if they are not qualified to receive either expanded FMLA or the Paid Sick Leave provisions of the FFCRA?

Many employees will be eligible for liberalized Unemployment Compensation (“UC”) benefits even if they are not eligible for benefits under other provisions of the law.

31. How do employees apply for Unemployment Compensation benefits?

Employees in most states can apply online for Unemployment Compensation benefits. In Pennsylvania for example, employees can access the state website and file for unemployment benefits at <https://www.uc.pa.gov/unemployment-benefits/Pages/default.aspx>.

32. Don’t some states require employees to wait a week before they can apply?

The FFCRA waives the waiting week for UC benefits. Because there will be a lag in processing claims because of the large number of claims filed due to the Coronavirus, employees should consider applying as soon as possible.

33. Will employees who do not have symptoms but are afraid of working receive UC benefits?

The answer to that question may vary state by state. In Pennsylvania, employees can check the PA Department of Labor and Industry’s website at <https://www.dli.pa.gov/Pages/default.aspx>. We expect other state UC websites will have good information as well.

34. How much will employees receive in UC benefits?

If employees are eligible for UC benefits, those benefits will vary based on earnings and work history. The amount of benefits will also vary on a state by state basis.

35. Will the UC changes adversely impact our state’s UC fund?

Hopefully not. The FFCRA comes after a time of remarkably low unemployment nationally, and the law has funding assistance provisions to make emergency transfers from the federal government in 2020. There will also be full federal funding for a period for the purpose of dealing with the UC impact due to the Coronavirus.

FINAL COMMENTS

36. What should I do if I have an employee whose health is being monitored?

Check for the most recent recommendation from the department of health for your state. For example, see the Pennsylvania Department of Health website at

<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Coronavirus%20Businesses%20Fact%20Sheet.pdf>

37. Is there any good news for Employers?

Yes, the Department of Homeland Security has relaxed I-9 rules for employers to allow employers to review documents remotely if the employer and workplaces are operating remotely. This is a new twist of “social distancing.”

38. Where can I learn more about this new law?

- United States Department of Labor
(<https://www.dol.gov/>)
- Centers for Disease Control and Prevention
(<https://www.cdc.gov/coronavirus>)
- Pennsylvania Department of Labor & Industry
(<https://www.dli.pa.gov/Pages/default.aspx>)
- Pennsylvania Department of Labor & Industry – Office of Unemployment Compensation
(<https://www.uc.pa.gov/Pages/default.aspx>)

We will attempt to supplement and update this information as developments continue and regulations are issued. Meanwhile please stay safe and know you are in our thoughts and prayers.

If you have any questions, please contact a member of the Business Team at [SkarlatosZonarich LLC](#):

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