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EMPLOYMENT LAW E-ALERT: Families First Coronavirus Response Act April 1, 2020

Attorneys Robert L. Leonard and Anjali V. Shankar

When does the law go into effect?

The Families First Coronavirus Response Act (FFCRA) goes into effect on April 1, 2020.

Which employers are covered under the FFCRA?

The Emergency Paid Sick Leave and Expanded Family and Medical Leave Act provisions apply to most employers with less than 500 employees (with some exceptions for federal employees). The Secretary of Labor can issue regulations exempting certain healthcare providers and emergency responders from the definition of eligible employees.

What types of leave does the FFCRA provide to employees?

The FFCRA provides paid leave in the following situations:

Emergency Paid Sick Leave – 100% Regular Rate

An employer must pay 100% an employee's regular rate of pay, up to a maximum of \$511 per day for up to two weeks (80 hours) (\$5,110 total) when:

1. An employee is subject to governmental (federal, state, or local) quarantine or isolation order related to COVID-19; or
2. An employee is advised by a healthcare provider to self-quarantine because of COVID-19; or
3. An employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

Emergency Paid Sick Leave – 2/3 Regular Rate

An employer must pay 2/3 of the employee's regular rate of pay, up to a maximum of \$200 per day for up to two weeks (80 hours) (\$2,000 total) when:

1. An employee is caring for an individual subject to a quarantine or isolation order related to COVID-19 or who has been advised by a health care professional to self-quarantine due to COVID-19; or
2. An employee is caring for his/her child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19; or
3. An employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

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All employee of covered employers are eligible for the emergency paid sick time for the specified reasons above.

Expanded Family Medical Leave Act

An employee that has been on the employer's payroll for at least 30 calendar days immediately preceding the date leave would begin may be eligible for 12 weeks of Expanded FMLA leave for one reason only: if the employee is unable to work or telework due to a need for leave to care for his/her child under 18 if school/day care is closed or if a child care provider is unavailable due to COVID-19.

This Expanded FMLA (E-FMLA) provision applies to employers with less than 500 employees. Leave under the E-FMLA applies to leaves between April 1, 2020 and December 31, 2020.

The first ten days may be unpaid, or the employee can substitute accrued leave or the two weeks of Emergency Sick Leave (see above). The remaining ten weeks must be paid at 2/3 the employee's regular rate of pay, up to a maximum of \$200 per day (\$10,000 total).

How is "regular rate of pay" calculated for part-time employees?

Part-time employees are entitled to equal to what the employee works on average over a two-week period. In other words, they would be eligible for fewer than 80 hours. If employees have varying hours, an employer may average the number of hours the employee was scheduled per day for the six months preceding the date of leave. If an employee has not worked at least six months, an employer can use the number of hours agreed to at the time of hire or, if no agreement, the average hours per day the employee was scheduled to work over the entire term of his or her employment. For example, if an employee regularly works 15 hours per week, he or she would be eligible for 30 hours of Emergency Paid Sick Leave.

Can an employee home with a child because his or her school or place of care is closed, or childcare provider is unavailable, get both paid sick leave and expanded FMLA leave?

Yes. An employee may be eligible for both types of leave, but only twelve weeks of paid leave. An employee may take both Emergency Paid Sick Leave and Expanded FMLA leave to care or his or her child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave, which covers the first ten working days of Expanded FMLA leave, which are otherwise unpaid under the Expanded FMLA unless the employee elects to use existing vacation, personal, or sick leave under an employer's policy. After the first ten working days have elapsed, an employee will receive 2/3 his or her regular rate of pay, up to \$200 per day, for the hours he or she would have been scheduled to work in the subsequent ten weeks under the Expanded FMLA.

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Are there any exemptions for small business owners?

Small businesses with less than 50 employees *may* qualify for an exemption from the requirement to provide leave due to school/daycare closings or childcare unavailability if the employer can demonstrate that providing such leave would jeopardize the viability of the 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 Emergency Paid Sick Leave or Expanded FMLA leave would result in the small business's 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 Emergency Paid Sick Leave or Expanded FMLA 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 Emergency Paid Sick Leave or Expanded FMLA leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Must employers restore employees to their positions after they take leave?

Generally, yes. But if an employer has less than 25 employees, it may not need to restore an employee to his or her position if:

- The position does not exist due to economic conditions or other damages in operating conditions of the employer (1) that affect employment; and (2) are caused by a public health emergency during the period of leave.
- The employer makes reasonable efforts to return the employee to an equivalent position but is unable to.
- The employer must make reasonable efforts to contact the employee for one year if an equivalent position becomes available, beginning on the earlier of (1) the date which leave concludes; or (2) 12 weeks after the date leave starts.

Should employers request documentation?

Yes, employers should require employees provide appropriate documentation in support of their reasons for leave for the employer to claim a payroll tax credit for FFCRA leave payments. Documentation could include a copy of the quarantine order, notice of school closure or unavailability of day care provider, written documentation from a health care provider advising the employee to self-quarantine, or an email or web announcement of a school or childcare closure. Employers should retain this documentation to claim tax credits.

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Can leave be taken intermittently?

Employers are not required to, but may, allow employees to take Emergency Paid Sick Leave or Expanded FMLA leave intermittently while teleworking, as schedules permit. The leave can be taken in any increment, provided the employer and employee agree.

If an employer closes its worksite after April 1, 2020 but before an employee goes on leave, can the employee still get paid sick leave and/or expanded FMLA?

No. The employee will not be eligible for leave but may be eligible for unemployment.

If an employer closes its worksite after April 1, 2020 while an employee is on Emergency Paid Sick Leave or Expanded FMLA, what happens?

The employer will be required to pay for any leave through the date of closure. As of the date of closure, the employee is no longer entitled to Emergency Paid Sick Leave or Expanded FMLA leave but may be eligible for unemployment.

Can an employee on furlough receive leave after the effective date of the FFCRA?

No, but the employee may be entitled to unemployment benefits.

Will an employee qualify for leave for a COVID-19 related reason if he or she has already used some or all of his or her leave under the FMLA?

Eligible employees are entitled to Emergency Paid Sick Leave under the Emergency Paid Sick Leave Act regardless of how much leave he or she has taken under the FMLA. If, however, the employer was covered by FMLA prior to April 1, 2020, the employee's eligibility for Expanded FMLA depends on how much leave the employee has already taken during the 12-month period the employer uses for FMLA leave. The employee can only take a total of 12 workweeks for FMLA or Expanded FMLA reasons during a 12-month period.

What are the notice requirements?

Covered employers must post the Department of Labor's notice in a conspicuous place on its premises. Alternatively, employers may email or direct mail the notice to employees or post the notice on an employee information internal or external website. Notice must be posted by **April 1, 2020**.

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