

Families First Coronavirus Response Act

Summary and Recommendations for Employers Peter S. Hicks, Shareholder

In the second piece of legislation passed by the Federal Government to address the COVID-19 outbreak, the Families First Coronavirus Response Act (HR 6201) (the “FFCRA”) enacts sweeping actions to assist employees impacted by the Coronavirus. The legislation also imposes significant new obligations on employers with less than 500 employees, expanding existing leave laws and requiring employers to provide paid leave in addition to the leave provided by individual employers and existing state and local law. Signed by President Trump on March 18, 2020, the FFCRA becomes effective on April 2, 2020, fifteen (15) days after enactment, and sunsets December 31, 2020.

The following is an overview of the provisions of the FFCRA most relevant to employers, and the steps employers should take to rapidly adjust and administer these newly-enacted provisions.

The Emergency Paid Sick Leave Act:

All private sector employers with fewer than 500 employees, government employers, and all other entities that are not private and have more than one employee are required to provide eighty (80) hours of paid sick leave **in addition to** any existing paid leave provided to employees by the employer.¹ This applies to all employees, regardless of how long the employee has been employed, and includes temporary and part time employees (such employees are entitled to paid leave on a pro rata basis).

Employees are eligible for leave if unable to work or telework due to:

- (1) Federal, State, or local COVID-19 quarantine or isolation²;
- (2) A self-quarantine recommendation from a health care provider due to COVID-19 concerns;
- (3) Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) Caring for an individual subject to (1) through (3) above;
- (5) Caring for the son or daughter if a school or childcare provider is closed or unavailable due to COVID-19 precautions; or

¹ The Secretary has authority to exempt small businesses (fewer than 50 employees) if requirements would jeopardize the viability of the business as a going concern.

² Significantly, this provision would appear to include Federal, State and local Shelter-in-Place Orders.

- (6) Experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretaries of Treasury and Labor.

For leave taken for purposes (1) through (3) above – quarantine or experiencing symptoms – the employee receives their regular pay rate or the greater of the federal, state, or local minimum wage. The benefit is capped however, up to a maximum of \$511 per day or \$5,110 in the aggregate.

For leave taken for purposes (4) through (6) above – caring for others – the employee receives two-thirds (2/3rds) of regular pay rate or minimum wage or the greater of the federal, state, or local minimum wage. This benefit is capped up to a maximum of \$200 per day, \$2,000 in the aggregate.

Employers may not require an employee to use other accrued paid leave before the employee can use sick time provided by the Act.

Employers may not discharge, discipline or discriminate against an employee who takes paid sick leave under the Act and/or has filed any complaint or instituted any proceeding under the Act, including enforcement, or who testifies or is about to testify in such proceeding. Employers who fail to provide leave will be considered to have failed to pay minimum wage in violation of section 6 of the Fair Labor Standards Act, and employers who willfully violate the paid leave requirements will be subject to additional enhanced penalties under the FLSA.

Employers must post and keep posted in conspicuous places, notice of the emergency paid sick leave requirements. The Secretary of Labor will provide a model notice for employers within 7 days of enactment of the bill.

Emergency Family and Medical Leave Expansion – Public Health Emergency Leave:

The FFRCA amends the FMLA (providing 12 weeks of job-protected leave), adding new “Public Health Emergency Leave” provisions and, most significantly, providing paid leave for eligible employees. Previously, all FMLA leave as unpaid. The amendments include:

- The definition of an “Eligible Employee” is revised to include employees employed at least 30 calendar days, rather than the existing standard requiring an eligible employee be employed for one (1) year or 1,250 hours.
- The expansion applies to employers with fewer than 500 employees. Small businesses with fewer than 50 employees may be exempt if the newly enacted requirements would jeopardize the viability of the business as a going concern. Previously, FMLA applied only to employers with 50 or more employees within a 75-mile radius.
- The “Qualified Need” for leave is expanded to include employees unable to work or telework due to need to care for employee’s minor son or daughter if school or childcare provider has been closed or is unavailable due to a COVID-19 related public health emergency declared by a Federal, State, or local authority.
- First 10 days of leave can be unpaid, although the Employee can elect to substitute accrued vacation, personal or sick time for unpaid leave.
- Subsequent leave days are paid at a rate of at least two-thirds (2/3rds) of the employees regular rate of pay at number of hours employee would normally be scheduled to work, up

to a maximum of \$200 per day and \$10,000 in the aggregate. For hourly employees with variable schedules, a formula will be applied to determine the appropriate rate:³

- Employee notice to employer: Must give employer “such notice of leave as is practicable” when need for leave is foreseeable.
- Generally, as previously required by the FMLA, eligible employees taking emergency leave are entitled to restoration of their position. However, the FFCRA provides that employers with fewer than 25 employees are not required to restore the employee to their prior position if:
 - The position no longer exists due to employer’s economic or operating condition; or
 - Employer makes reasonable efforts to restore employee to an equivalent position, with equivalent pay and other terms and conditions of employment; or
 - If the above reasonable efforts to restore the employee fail, the employer must then make reasonable efforts over a 1-year “contact period” to contact the employee if an equivalent position becomes available.
- Multi-Employer Bargaining Agreements: Employees who work under a multi-employer collective bargaining agreement are included in the Act.
- Gives Secretary authority to exclude health care providers and emergency responders from definition of “Eligible Employee.”

Tax Credits:

Employers will be provided with a payroll tax credit against the employer portion of Social Security/Railroad Retirement payroll taxes equal to 100% of qualified public health emergency leave wages and qualified Emergency Paid Sick Leave wages and qualified Public Health Emergency Leave wages (Division E) paid each quarter through the end of the calendar year. This is a dollar for dollar offset, and any payments that exceed the employer’s payroll tax liability will be refunded to the employer. Thus, if an employer pays \$15,000 in leave benefits during a quarter, but has a payroll tax liability of only \$10,000, the employer will be reimbursed \$5,000. Employers will also receive credit for health care coverage for employees on leave.

Emergency Unemployment Insurance Stabilization Act:

The Emergency Unemployment Insurance Stabilization Act allows the Secretary of Labor to make emergency grants to States in the Unemployment Trust Fund, up to \$1 billion in 2020. To receive grants, States must require employers to provide notification of the availability of unemployment compensation at the time of employment separation. States are also encouraged to relax eligibility requirements for compensation, including waiving work search requirements and the waiting week, and non-charging employers directly impacted by COVID-19 due to illness in the workplace or direction from a public health official to isolate or quarantine workers. The Secretary of Labor will also assist States in establishing and improving employer awareness of short time compensation programs.

³ Should you need guidance regarding the formula for variable schedules, please do not hesitate to contact Jordan Ramis.

What Employers Should Do:

1. Review and have a thorough understanding of your own PTO, sick leave and vacation policies. The benefits under the FFCRA are generally in addition to your own internal leave policies. For example, employers cannot require employees to exhaust PTO, sick leave or vacation prior to leave under the leave under Emergency Paid Sick Leave. However, employers can allow employees to substitute PTO, sick leave or vacation under the Public Health Emergency Expansion.
2. Review and understand the interrelationship between all potentially available leaves, including employer provided leave, federal, state and local leaves. For example, Oregon recently expanded coverage of the Oregon Family Leave Act (OFLA). All available leaves should be carefully coordinated to ensure employees receive leave they are entitled to and employers are able to adequately staff their workplace while managing costs associated with providing leave. Jordan Ramis can assist by providing an outline of the interaction between your specific policies and potentially applicable laws to help administer all available leave.
3. Evaluate and implement telework or remote work where possible. Creative ways to help employees to work will allow them to remain productive while not unnecessarily consuming leave. Be mindful of confidentiality and security however, and consider formalizing remote work agreements to preserve confidentiality and avoid additional wage and hour issues for non-exempt employees.
4. Keep in close contact with your employees and provide regular updates regarding available leave. Also carefully consider how or when you question or decline a request for leave. Penalties for failing to notify employees of potential leave or improperly denying leave are substantial.
5. To the extent you are not already doing so, employees that are ill or experience symptoms should be required to stay home. Employees reporting to work with any symptoms should be sent home immediately and directed to remain at home.

We are here to help you through these challenging times. Please feel free to reach out directly to Peter Hicks (541) 797-2079 or Steve Shropshire (503) 522-8667 with any questions or issues.