

CLIENT ALERT

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

Whether you are a non-essential or essential business – are you employing employees? If so, then you must comply with the Families First Coronavirus Response Act (FFCRA) that applies to all businesses with fewer than 500 employees and is effective from April 1, 2020 through December 31, 2020. The FFCRA has 2 key provisions: (1) creating limited paid sick leave (Emergency Paid Sick Leave Act); and (2) amending the Family and Medical Leave Act (FMLA) to expand coverage for child-care related reasons due to COVID-19 (The Emergency Family & Medical Leave Expansion Act). Businesses qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the FFCRA for a qualifying reason, up to the appropriate per diem and aggregate payment caps, and tax credits all apply to amounts paid or incurred to maintain health insurance coverage. Businesses must post notice of FFCRA requirements along with other statutorily required notifications.

The Emergency Paid Sick Leave Act (EPSLA)

All full and part-time employees are immediately eligible for limited paid sick leave. If a full-time employee qualifies for paid sick leave, he/she is entitled to 80 hours of paid sick leave in total; If a part-time employee qualifies for paid sick leave, he/she is entitled to the number of hours equal to the average number of hours he/she works over a 2-week period. EPSL leave can be taken intermittently if the employer and the employee agree and only for reason number 5 below.

To qualify for ESPLA leave the employee must be unable to work or telework because:

1. Employee is subject to a quarantine or isolation order related to COVID-19; or
2. Employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; or
4. Employee is caring for an individual who needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice; or
5. Employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions; or
6. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

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If an employee's qualifying reason is due to his/her own COVID-19 qualifying reason (#1-3), he/she is paid at regular rate of pay, capped at \$511 per day and \$5,110 in the aggregate. If an employee's qualifying reason is due to caring for a family member's COVID-19 qualifying reason (#4-6), he/she is paid at 2/3 of regular rate of pay, capped at \$200 per day and \$2,000 in the aggregate.

The Emergency Family & Medical Leave Expansion Act (EFMLEA)

The second provision of the FFCRA is an amendment to the FMLA that expands coverage for child-care related reasons due to COVID-19 and applies to all businesses with fewer than 500 employees. Under this provision, employees are entitled to twelve weeks of protected leave of which the first two weeks are unpaid. Employees may use their EPSLA leave to cover those two unpaid weeks, which equates to a total of 12 weeks of limited paid expanded family leave when combined with EPSLA. The leave can be taken intermittently if the employer and the employee agree. If your business has fewer than 50 employees, then this is the only provision of the FMLA that applies to your business. In other words, if your business has fewer than 50 employees and your employee breaks his leg, he/she is not now covered by the prior existing leave protections of the FMLA. If your business has 50 or more employees (covered by the FMLA), this provision does not entitle employees to an additional 12-week FMLA entitlement – it expands the reasons for the leave and specifies how employees are to be paid for the leave.

An employee is eligible for EFMLEA leave if he/she has been employed for at least 30 calendar days and is unable to work or telework due to a need to care for the employee's son or daughter under the age of 18 if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable due to COVID-19. That is the only eligible reason for this expanded leave. It is important to note that employees on furlough are not entitled to FFCRA benefits regardless of the date of the furlough. For example, if an employee is furloughed on May 1, 2020, he/she is not entitled to paid sick leave or paid leave related to childcare.

Healthcare providers (doctor's office, hospital, health care center, clinic, post-secondary nursing, EMT, medical school, nursing or retirement facility, laboratory or medical testing facility, pharmacy or any business that contracts with those business or a medical supplier, lab, manufacturer involved in Covid-19 response) can elect to exclude their employees from the provisions of the EFMLEA. Similarly, businesses with fewer than 50 employees may be exempt from compliance with the EFMLEA only when compliance would "jeopardize the viability of the business as a going concern." The USDOL has not

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announced how to file for this exemption and so businesses seeking to deny leave on this basis should document all facts and circumstances that meet the criteria in the rule to substantiate the claim.

If an employee qualifies for EFMLEA leave, the first 2 weeks are unpaid unless the employee uses available EPSL (payable at 2/3 of the employee's regular rate of pay for this leave), or the employee elects, with the employer's agreement, to use other paid leave to supplement EPSL. After the first 2 weeks of EFMLEA, the employee may choose or the employer may require, that the employee use paid time off. If that arrangement is not made, then absences must be paid at 2/3 of the employee's regular rate of pay at a cap of \$200 per day and \$10,000 in the aggregate per employee.

Under FFCRA, an employer cannot require employees to use other paid leave first (vacation, sick, PTO); cannot require an employee to find a replacement employee; and cannot discharge, discipline, or discriminate against an employee who takes leave (or engaged in related protected leave). The USDOL has enforcement authority, including the ability to assess civil penalties under the FLSA for businesses that are not in compliance. Businesses who have employees working remotely or on-site must be aware of and in compliance with this new law if they are a covered employer and if their employees request time off for a qualifying reason.

Should you have any questions about how the new laws apply to you or your business, please contact our employment law attorneys at 603.369.4769. We are here to help.