

President Trump Signs Relief Package for Employers: Families First Coronavirus Response Act

Article

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Late last night, President Trump signed the Families First Coronavirus Response Act (FFCRA), an emergency relief package designed to assist employers and employees in the wake of the 2019 coronavirus pandemic (COVID-19). This signature is on the heels of the Senate which voted to accept a revised version of FFCRA on March 18, 2020. FFCRA was passed by the U.S. House of Representatives on March 14, 2020.

This is the second emergency relief legislation that Congress passed. The Joint Committee on Taxation estimates it will cost \$104 billion. Key priorities of FFCRA include paid sick leave, expanded emergency medical and family leave, and tax credits available to employers to offset some of the associated costs under this relief package. A third emergency relief package is near completion. Please note these provisions may still be impacted based on state law.

As noted below, the effective date of the FFCRA is April 2, 2020. It is unclear from the text of the law whether employees who are terminated before April 2nd have any rights under it. While arguably they do not, employers should be aware of possible negative optics related to laying off an employee immediately prior to their eligibility for rights under the law. Employers considering making such decisions prior to April 2nd should reach out to experienced employment counsel in order to avoid these concerns and any unanticipated liability.

Note: Employers should be on the lookout for directives from the Department of Labor. Additionally, employers must be cognizant of federal and state employment workplace posting requirements.

Job-Protected Leave Under the Emergency Family and Medical Leave Expansion Act (EFMLA)

This law temporarily expands the Family and Medical Leave Act of 1993 (FMLA) to eligible employees for "a qualifying need related to a public health emergency." This temporary expansion of FMLA is effective April 2, 2020, and expires December 31, 2020.

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Previously, employees were authorized to take up to 12 weeks of job-protected leave under FMLA but the leave was unpaid. This emergency expansion of the law requires that 10 of the 12 weeks are paid at a rate of no less than two-thirds of the employee's usual pay rate ("leave rate"). For employees to be eligible for this paid leave under EFMLA, an employee must: (1) be an employee with an employer of fewer than 500 employees, (2) be on the employer's payroll for 30 calendar days, and (3) be an employee unable to work (or telework) due to a need to care for a minor child if the child's school or place of child care has been closed or is unavailable due to a public health emergency. All FMLA provisions apply to EFMLA, therefore employers would continue to count employees under traditional FMLA provisions.

EFMLA requires the first ten (10) days of leave to be unpaid. The employee may choose to substitute paid time off or other sick leave during this period. The employer cannot require the employee to use paid time off or other leave time provided under the employer provided benefits. After the initial unpaid period, then the employer must pay the "leave rate". For employees with varying work hours, a special formula is provided to determine the "leave rate" for those employees. The bill limits the amount of required pay for leave to no more than \$200 per day and \$10,000 in the aggregate. This would cover two-thirds of the typical daily wage of an employee earning approximately \$75,000 annually.

EFMLA is an expansion, not replacement of FMLA. Therefore, employers must adhere to all provisions of FMLA. This includes job-protection by providing the same or equivalent position to the employee upon return to work after FMLA leave is completed. There is an available exception to employers with less than 25 employees if the employee's position no longer exists following leave due to operational changes triggered by a public health emergency, subject to certain conditions.

For certain businesses, this law contains a potential exception to the expansion of FMLA. The Secretary of Labor has authority to issue regulations exempting: (1) certain health care providers and emergency responders from taking leave under the bill; and (2) small business with fewer than 50 employees from the requirements of the bill if it would jeopardize the viability of the business.

Employers with less than 50 employees may apply for a waiver exempting them from this payment. These payments are subject to future tax credits.

Emergency Paid Sick Leave

The Emergency Paid Sick Leave Act (PSLA) under FFCRA applies to employers with less than 500 employees and public employers. Like the EFMLA, its effective date is on or before April 2, 2020, and it expires on December 31, 2020. Unlike the emergency FMLA requirements, an employee is immediately eligible for this leave (there is no 30 calendar day on payroll requirement). These employers are required to provide full-time employees with 2 weeks of paid sick leave capped at

80 hours. The sick leave is permitted when an employee is unable to work (or telework) for the following reasons:

- Caring for an individual who is subject to an order to quarantine or isolate, or advised by a health care provider to self-quarantine;
- Caring for the child of a quarantined, isolated, or self-quarantined person when the child's school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions;
- 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.

The sick leave is required to be paid at the regular rate of pay for the employee with one exception. If the employee uses sick leave to care for a family member or child due to the coronavirus, then the employer is only required to pay the employee two-thirds the employee's rate of pay.

Importantly, this law also applies to part-time workers. Employers are required to provide paid leave to a part-time employee. The part-time employee is entitled to paid leave based upon the number of hours worked on average, over a two-week period.

The emergency paid sick leave must be provided *in addition* to any leave already provided. Employers cannot change any employee paid leave policies, nor can they require the employee to take other paid leave options before using this new two week paid leave benefit.

Finally, the Senate revised the total payments per day with a cap of \$511 per day to an employee. These payments qualify for employer tax credits.

Employer Tax Credits for Paid FMLA and Sick Leave

To help the employer offset the cost of paid leave under FFRC, tax credits are available to use against the employer's quarterly payroll taxes. The tax credits are subject to certain caps, but employers may be able to recover up to 100% of qualified sick leave wages and 100% of qualified family leave wages. The Treasury Department is expected to release regulations shortly.

The provision limits the amount of qualified sick leave wages that is taken into account with respect to an individual for purposes of the credit. In the case of paid sick time qualifying under the first three sick leave reasons (illness or quarantines), the amount of qualified sick leave wages taken into account for purposes of the credit may not exceed \$511 for any day (or any portion thereof) for which the individual is paid such sick time. In the case of paid sick time qualifying under the last three reasons (caring for others or school closures), the amount of qualified sick leave wages taken into account may not exceed \$200 for any day (or portion thereof) for which the individual is paid such sick time.

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For family leave wages paid by an employer, a separate payroll tax credit applies, with different limitations. The 100% credit against the employer's share of the payroll tax is limited to \$200 per day, up to an aggregate of \$10,000. The credit may be increased by certain health plan expenses of the employer.

The law also provides \$1 billion in grants to states for unemployment insurance.

Please note that at this time, this law is not subject to employers with more than 500 employees. Those employers likely already provide extensive paid time off and sick leave, thus not requiring the extra federal stimulus support at this time.

Pending Phase Three Relief Package

The Trump administration is pushing for an additional stimulus bill to assist the economy and fellow Americans. The administration and Congress are considering a cash payment to households around the country. Congress is considering two \$250 billion rounds of direct payments to individual taxpayers with the first round of two payments available as early as April. The specifics are pending on this third relief package.

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