



THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

March 19, 2020

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Rubin, Fortunato & Harbison P.C. is committed to providing periodic updates on information that is critical for employers to know regarding statutory, regulatory, and other developments related to the novel coronavirus COVID-19.

The Families First Coronavirus Response Act (FFCRA) was signed into law on Wednesday, March 18, 2020.

Employers should be aware of the following provisions that directly impact businesses and their employees:

- *Emergency Family and Medical Leave Expansion*

Under FFCRA, the Family and Medical Leave Act (“FMLA”) is expanded to ensure coverage for people impacted by COVID-19 who might otherwise not be eligible for coverage under the FMLA as it is currently enacted. The FFCRA’s expanded FMLA is effective no later than April 2 and expires December 31, 2020.

Under the expanded FMLA, an employee is eligible for leave if the employee is employed for at least 30 calendar days prior to the date upon which leave is requested; this service time is substantially shorter than the service time required for eligibility under the previous version of FMLA. Similarly, the requirements of expanded FMLA apply to any employer with “fewer than 500 employees,” so even small businesses are required to provide this leave to employees during this public health emergency.

In addition to the existing reasons for which an employee may be eligible for leave under the FMLA, under the expanded FMLA, an employee may also be eligible for leave if the employee needs to care for a minor child if that child’s elementary or secondary school, child care facility, or other care program has been closed, or the regular child care provider is unavailable due to the public health emergency.

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The first ten days of any leave may be unpaid. The employee may choose to substitute accrued vacation leave, personal leave, or sick leave for the unpaid leave. After the first ten days, the employer must provide the employee with paid leave under the expanded FMLA. The employee will be paid at an amount equal to two-thirds (2/3) of the employee's regular rate of pay based on the number of hours the employee would otherwise be regularly scheduled to work. If the employee has variable hours, the employer shall determine the number of hours to be paid based on either (a) the average number of hours that the employee had worked over the prior six-month period; or (b) the employee's reasonable expectation at the time of hiring of the amount of hours per day that the employee would normally be asked to work. However, in no event shall the paid leave exceed \$200 per day or \$10,000 in the aggregate.

The employee must provide the employer with notice of the need for leave at the earliest practicable moment, and the employer, under most circumstances, must restore the employee to the same or equivalent position at the end of the leave period.

Employers and employees who are subject to a multi-employer collective bargaining agreement may comply with their obligations to provide expanded FMLA through the provisions for paid family leave under the applicable fund, plan, or program.

- *Emergency Unemployment Insurance Stabilization and Access Act*

Under FFCRA, the federal government will work with state governments to increase unemployment insurance funding, expand awareness, and ease eligibility requirements and the application process. The federal government will provide funds to help states facilitate the applications and processing of unemployment insurance claims in anticipation of a spike in claims and to ensure that extended benefits (an additional 26 weeks after the first 26 weeks are exhausted) for impacted workers in qualifying states are fully funded.

Employers must provide all laid-off or terminated employees with information on potential eligibility for unemployment insurance at the time of termination. Employers should not assume that impacted workers are aware of their potential eligibility.

- *Emergency Paid Sick Leave Act*

In one of the more significant changes, under FFCRA, an employer must provide each employee paid sick time to the extent the employee is unable to work (or telework) due to a need for leave because the employee: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) is caring for an

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individual subject to an order described in subparagraphs (1) or (2); (5) needs to care for a minor child if that child's school, child care facility, or other care program has been closed due to COVID-19; or (6) is experiencing a substantially similar condition as determined by various cabinet agencies.

Notwithstanding the foregoing, the employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.

For employees who need paid sick time due to a COVID-19 related reason (as enumerated in the statute), full-time employees shall be entitled to 80 hours of paid sick time and part-time employees shall be entitled to the number of hours that the employee works on average over a two-week period. The paid sick time is available to all employees regardless of how long they have worked for the employer. Employers cannot require employees to use other paid leave before using the paid sick time granted under FFCRA.

Employers are required to provide conspicuous notice to employees of the provisions of FFCRA. The Secretary of Labor will make publicly available a model notice that employers can use to satisfy their obligations to provide notice to employees.

Statutory caps exist on the amount that is required to be paid as sick leave, as well as specific provisions governing the rate of pay to be used in calculating compensation owed, which vary depending on the reason for the sick leave.

- *Coverage of Testing for COVID-19*

Under FFCRA, all private health insurance plans must cover testing for COVID-19 at *no* cost to the consumer, regardless of whether the tests are performed at a primary care provider, urgent care clinic, or hospital. Veterans, Medicaid recipients, government employees, and people who receive benefits through a federally-sponsored program (e.g., TRICARE, Medicare Part B, Medicare Advantage, CHIP) will have cost-sharing waived for testing and for some services. For employees who have no insurance, the costs of lab testing will be reimbursed.

Finally, in an effort to ease the burden on employers, several tax credits were made available to employers for qualified sick leave wages, qualified family leave wages, and certain health plan expenses. Some tax credits are also available for self-employed individuals.

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