

US Emergency Paid Leave Act: New Relief to Mitigate COVID-19's Economic Impact

The legislation provides COVID-19-related paid leave that impacts many employers, but important questions remain.

Key Points:

- The Act impacts employers with one to 499 employees, and will be effective no later than April 2, 2020 and will continue in effect through December 31, 2020.
- Employees could receive up to a total of 14 weeks off¹, with 12 weeks of leave paid by the employer.
- Two weeks of paid leave under the Act may be used for self-quarantine, illness-related purposes (including taking care of a child who is ill), or to care for a son or daughter (under age 18) due to a school closure or child care becomes unavailable due to COVID-19.
- Up to ten additional weeks may be used by an employee to care for a son or daughter (under age 18) affected by a school closure or loss of child care due to COVID-19.
- Employers may offset their costs under the Act with a refundable tax credit against their portion of quarterly Social Security tax payments.
- The legislation's interaction with existing employer policies and with state and local requirements remains uncertain in some cases.

The Families First Coronavirus Response Act, [H.R. 6201](#) (FFCRA), signed into law by the President on March 18, 2020, contains important provisions concerning unprecedented mandatory paid leave applicable to many employers. The FFCRA establishes new temporary paid leave requirements for employers with as few as one employee, but no more than 499 employees. Whether additional legislation covering larger employers will follow is uncertain.

Key Elements of the FFCRA

The FFCRA provides eligible employees with both paid sick leave and paid family leave under the federal Family and Medical Leave Act (FMLA) in a manner that is unprecedented in the United States.

Under the FFCRA, an eligible employee may be entitled to two weeks of paid leave pursuant to the emergency paid sick leave provisions of the statute, followed by an additional 10 weeks of paid leave pursuant to temporary paid leave expansions under the FMLA (for a total of up to 12 weeks of paid leave).

In order to help employers finance these new temporary paid leave requirements, the FFCRA provides refundable tax credits against the employer's portion of its quarterly Social Security tax payments made during each such calendar quarter for amounts paid for FMLA and sick leave taken under the FFCRA.

Federally Mandated Paid Leave Coverage

- *Even small employers will be required to provide some paid leave.* Employers with fewer than 50 employees generally are exempt from the job-protection leave requirements under the FMLA. The FFCRA will, subject to limited exceptions, impose new paid family and medical leave provisions of the FMLA on these employers with respect to employees affected by a school closure or because child care becomes unavailable due to COVID-19. Additionally, all employers employing between one employee and 499 employees are subject to emergency paid sick leave.²
- *Eligibility requirements for employees are minimal.* Expanded FMLA leave is generally available for employees who have been employed by the applicable employer for at least 30 days.³ There is no minimum service requirement for employees to use two weeks of emergency paid sick leave.

Emergency Paid Sick Leave

- *Events triggering emergency paid sick leave.* Employers with fewer than 500 employees must provide up to two weeks' additional paid sick leave to the extent that an employee is unable to work (or telework) for any of the following reasons:
 1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
 3. The employee is experiencing symptoms of COVID-19 and needs to obtain a medical diagnosis
 4. To care for an individual who is subject to an order under (1) above or been advised to self-quarantine under (2) above
 5. To care for the employee's son or daughter (under age 18) if the child's school⁴ or place of care has been closed, or the child-care provider⁵ is unavailable, due to COVID-19 precautions
 6. The employee experiences any other substantially similar condition as may be specified by the Secretary of Health and Human Services
- *Amount of emergency paid sick leave.* Full-time employees receive 80 hours of paid sick leave and part-time employees receive an amount equal to their average number of hours over a two-week period. These additional leave entitlements do not carry over year-to-year, and any such unused leave is not required to be paid out upon termination. Employers may not require employees to use existing paid sick leave under the employer's policy prior to using paid sick leave under the FFCRA.
- *Rate of pay during emergency paid sick leave.* The amount of wages received for leave pursuant to (1), (2), or (3) above is paid at the employee's regular rate of pay and capped at US\$511 per day (up to US\$5,110 in total). The amount of wages received for leave pursuant to (4), (5), (6) is paid at a

minimum of two-thirds of the employee's regular rate of pay and capped at US\$200 per day (up to US\$2,000 in total). The FFCRA prohibits retaliation against employees using sick leave.

Expanded Paid Family and Medical Leave

- *Events triggering paid family and medical leave.* Pursuant to the FFCRA, employers will now be required to provide up to 12 weeks of job-protected leave under the FMLA to eligible to care for the employee's son or daughter (under age 18) if such son or daughter's school or place of care has been closed, or the child-care provider is unavailable, due to the COVID-19-related public health emergency. *For these purposes, "son or daughter" has the same meaning as in the FMLA and means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is — under 18 years of age; or 18 years of age or older and incapable of self-care because of mental or physical disability.*
- *Timing and amount of paid leave.* Leave is unpaid for the initial 10-day period. Employees may elect to use available paid leave, such as accrued sick and vacation time, as a substitute for the first 10 days of unpaid leave. After the initial 10-day period, the employee must be paid during the remainder of the leave at no less than two-thirds of his or her regular pay rate based on the number of hours regularly worked by the employee, but subject to a maximum cap of \$200 per day and \$10,000 in the aggregate (*i.e.*, 10 work weeks of 5 days each at \$200 per day).
- *Reinstatement Exemption.* Employers with fewer than 25 employees are exempt from the reinstatement requirements of the FMLA as expanded by the FFCRA if, at the end of the leave, the position held by the employee upon commencement of leave does not exist due to changes in operating conditions of the employer that affect employment and are caused by the public health emergency. However, the employer must make reasonable efforts to reinstate the employee to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment; if unable to do so, the employer must contact the employee if such a position becomes available within one year following the earlier of the end of the leave or the 12-week period after the employee's leave begins.
- *Notable Exceptions.* Notably, the FFCRA expansion of FMLA does not require an employer to provide leaves related to COVID-19-related illness, quarantine or care for those who have fallen ill or are quarantined. Accordingly, employers who employ less than 50 employees are not required under the FFCRA to provide FMLA leave, other than leave related to school closure or unavailability of child care as described above.

Other Key Terms

- *Effective date.* These emergency paid sick leave and FMLA paid leave requirements will go into effect no later than April 2, 2020 and are set to expire on December 31, 2020.
- *Tax Credits.* The FFCRA provides refundable tax credits against the employer's portion of the quarterly Social Security tax payments for payments made in each quarter for paid FMLA and sick leave taken under the FFCRA. Special rules apply to self-employed individuals that extend the tax credit framework to these individuals. The Department of the Treasury is directed to provide regulations or other guidance to carry out the tax credit construct.

The amount of the tax credit is generally equal to 100% of the qualified sick leave wages and qualified family leave wages paid by the employer with respect to the calendar quarter, up to a

per-employee cap of US\$511 per day for qualified sick leave wages (up to US\$7,154 in total) and US\$200 per day for qualified family leave wages (up to a maximum of US\$10,000 in total).

If the aggregate amount of qualified sick leave wages and qualified family leave wages paid by the employer with respect to a calendar quarter exceeds the employer's portion of the quarterly Social Security tax payments payable with respect to all employees, the excess will be treated as an overpayment and will result in a refund for the employer.

In addition, the amount of tax credit allowed may be increased by the amount paid or incurred by the employer to provide and maintain a group health plan that are allocable to the qualified sick leave wages for which such tax credit is allowed a "qualified health plan expense." The allocation shall be made on a pro rata based among covered employees and on the basis of periods of coverage. The Treasury Department is empowered to prescribe rules regarding how "qualified health plan expenses" will be allocated to qualified sick leave wages.

Employers cannot "double dip" by claiming both a deduction for qualified sick leave wages and qualified family leave wages and the applicable tax credits.

- *Compliance for unionized employees.* Employers that are parties to multi-employer collective bargaining agreements may satisfy these requirements through contributions to funds, plans, or programs providing for such paid leave under the multi-employer collective bargaining agreements.
- *Employee notice.* Employers are required to post and keep posted, in conspicuous places on their premises, a notice of the paid sick leave requirements described under the FFCRA. The Secretary of Labor will make a model notice available no later than March 25, 2020.
- *Emergency Responder and Health Care Provider Exemptions.* The Department of Labor may waive application of the FFCRA to or allow employers of employees who are health care providers or emergency responders to opt out of the paid leave requirements of the FFCRA.

Important Unanswered Questions

The Act raises many questions for employers that will hopefully be resolved through interpretive guidance of additional legislation. The questions include:

- How will paid leave under the FFCRA interact with existing paid leave benefits? The bill, as originally passed by the House, specified it was in addition to existing paid leave, but the final law leaves that question unanswered.
- Does extended paid family or medical leave offered by certain employers count against the paid FMLA requirements of the FFCRA?
- If existing policies or state and local requirements count against the FFCRA's requirements, how will that impact the tax credit?
- How will "qualified health plan expenses" be determined? Will it include the full amount of any out-of-pocket costs, including any additional administrative expenses incurred by an employer who self-insures a group health plan, or just the amount of allocable premiums for the paid leave period?

- If an employee's child care provider is unable to provide child care services because the provider is also taking care of his/her own son or daughter due to a school closure related to COVID-19, will that qualify the employee for FFCRA sick leave benefits?

Next Steps

Employers should consider taking the following steps to prepare for the FFCRA's effectiveness. In particular, employers should consider:

- Preparing to implement the FFCRA by:
 1. Reviewing existing paid leave policies for their coordination with the FFCRA
 2. Drafting communications to employees and updating them as needed now that the FFCRA is final — in most cases, this may require a supplement to current sick leave and FMLA policies and the posting of notices regarding the same
 3. For employers with fewer than 50 employees that do not have experience with the FMLA, consult a Latham & Watkins lawyer for advice
 4. Posting the required notice of employees' rights under the FFCRA
- Maintain records of leave payments made under the FFCRA for tax reporting purposes.

Latham will continue to monitor and advise on developments in this area.

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Endnotes

¹ Comprised of 12 weeks of leave under the FMLA (10 weeks paid) plus 2 weeks of emergency paid sick leave.

² The Secretary of Labor, on a case-by-case basis, is authorized to issue regulations to exempt an employer with fewer than 50 employees from the paid leave requirements to the extent such leave could jeopardize the viability of its business as a going concern.

³ The Secretary of Labor is authorized to issue regulations to exempt certain emergency responders and healthcare providers.

⁴ "School" is limited to elementary and secondary schools, and does not include colleges or universities.

⁵ "Child care provider" means a provider who receives compensation for providing child care services on a regular basis.

