



March 19, 2020 | LEGAL ALERT

Congress Passes Families First Coronavirus Response Act

On March 18, Congress passed, and President Trump signed into law, the [Families First Coronavirus Response Act](#) (FFCRA). The FFCRA is a bipartisan effort to help employers and individuals alike in managing pay, benefits, and business considerations during the COVID-19 pandemic. The focus of this alert is the impact of FFCRA on employer-sponsored benefits and paid leave. The paid leave provisions of the Act apply to employers with less than 500 employees. They are effective within 15 days from date of enactment and expire at the end of 2020, unless extended.

Mandated Free Testing

FFCRA mandates free COVID-19 testing from **all** group health plans, including fully insured and self-funded plans, as well as grandfathered plans. All group health plans must waive cost-sharing, prior authorization requirements, and other medical management as it relates to COVID-19 testing. This includes provider office visits, urgent care, emergency room, and other healthcare visits that are for the purpose of evaluating or administering testing.

Emergency FMLA

The FFCRA provides for up to 12 weeks of job-protected leave under the Family and Medical Leave Act ("FMLA") for a "qualifying need related to a public health emergency." These provisions generally apply to private-sector employers with under 500 employees and all government employers. (There are exceptions for employers with less than 50 employees if the required leave would jeopardize the viability of their business.) This new law expands the leave for employees who have been employed at least 30 days, overriding, for these purposes, FMLA's general requirement that employees must be employed for at least 12 months to be covered. For these purposes, a "qualifying need" exists if an employee is unable to work or telework because he/she/they need to care for a child who is under 18 years if their school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency, such as COVID-19.

This Emergency FMLA rule also requires employers to pay employees after 10 days. Employees on leave are to be paid at two-thirds of their regular rate of pay, based on normally scheduled hours, up to \$200 per day and to a maximum of \$10,000.

Emergency Paid Sick Leave

FFCRA requires employers with less than 500 employees to provide paid sick leave to any employee who is unable to work or telework 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. Has COVID-19 symptoms and is seeking medical diagnosis;
4. Is caring for an individual who is subject to a quarantine or isolation order;

5. Is caring for a child if the school or day care center has been closed, or the child care provider is unavailable, due to COVID-19 precautions; or
6. Is experiencing any other substantially similar condition specified by the regulatory agencies.

Overall, employees are entitled to at least 80 hours of paid sick leave (prorated for part-time employees). An employee is immediately eligible on date of hire. An employer cannot require an employee who is eligible for paid sick leave to find a replacement or be involved in finding a replacement for their scheduled work shift. Paid leave is limited to \$511 per day (\$5,110 total) for an employee's own illness or quarantine (paid at the employee's regular rate), and \$200 per day (\$2,000 total) for leave to care for others (paid at two-thirds of the employee's regular rate). Failure to pay the required sick leave is treated as a failure to pay minimum wages in violation of the Fair Labor Standards Act.

Tax Credits

FFCRA offers some relief to employers who are now required to provide paid leave. The credit is available for up to \$200 per day for Emergency FMLA and up to \$511 per day for Emergency Paid Sick Leave payments. The credit is calculated on an individual employee basis for a total of 10 days paid leave. Employers should maintain records on employees who qualify for leave, which includes the reason for the leave, and the days taken in order to substantiate qualifications for the credit.

There is also another tax credit for employers who continue to provide health coverage to employees who take Emergency FMLA or Emergency Paid Sick Leave. Employers may receive a credit for the amount paid toward maintaining the health plan, for the amounts excluded from an employee's gross income as it related to federal income tax. This is in addition to wages paid for qualifying leave, but it cannot exceed the credit available for Emergency FMLA and Emergency Paid Sick Leave. This credit is to be requested on quarterly tax returns. It will be included in an employer's gross income.

What Employers Should Expect Next

We expect additional guidance at the state and federal levels that may impact employee benefit plans, and potentially more state leave requirements. It is also important for employers to stay up-to-date on their state and municipal notices, as some are providing for insurance requirements. In addition, employers need to be cognizant of local and state emergency regulations that may affect how employers in certain industries, such as food services, operate during a public health emergency.

For more information on COVID-19, see:

- <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

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