



# An Employer's Guide to the New Families First Coronavirus Response Act's Paid Leave and Expanded FMLA Requirements

*March 25, 2020*

# Roadmap

- Families First Coronavirus Response Act (FFCRA) components
- Covered employers and exempt employers
- Covered employees
- Employers obligations and how to calculate benefits
- Penalties and other considerations
- How the components work together
- Intermittent leave
- Tax credits
- How FFCRA works with unemployment

# Families First Coronavirus Response Act (FFCRA)

- March 19, 2020 President Trump signed into law
  - **Effective April 1, 2020**, and continues through December 31, 2020
  - Two Important Acts within
    - FMLA Expansion Act
    - Emergency Paid Sick Leave Act

# Which employers are covered?

- FMLA Expansion
  - Fewer than 500 employees **and** public agencies covered under FMLA
  - Small Businesses (under 50 employees) may be exempt under future DOL regulations if complying with the Act would “jeopardize the viability of the business as a going concern”
  - 50 employee / 75 mile radius rule intact
  - Special Rule for Health Care Providers—health care providers or emergency responder may elect to exclude employees from these benefits
- Emergency Paid Sick Leave
  - Fewer than 500 employees **and** public agencies that employ 1 or more employees
  - Small Businesses (under 50 employees) may be exempt under future DOL regulations if complying with the Act would “jeopardize the viability of the business as a going concern”
  - The DOL may issue regulations allowing employers of health care providers and emergency responders to opt-out of the benefits.

# How to count number of employees

## *Waiting for guidance from DOL*

- **Expanded FMLA**

- FMLA for guidance—Integrated employer test
- Factors:
  - Common management;
  - Interrelation between operations;
  - Centralized control of labor relations;
  - Common ownership

- **Emergency Paid Sick Leave Act**

- FLSA for guidance – Single Enterprise and Joint Employer Tests
- Single Enterprise: Companies must engage in in relate activities, have unified operations or common control, and have a common business purpose (i.e., share related actives and common control).
- Joint Employer: highly fact specific
- If the only connection between two affiliates is ultimate common ownership, they should NOT be aggregated to meet 500 employee threshold
- If the entities share a common HR function and hiring/firing authority they MAY be aggregated

# Which employees are covered?

- **FMLA Expansion**

- Employees working for at least 30 days
- Must be unable to work (or telework) AND
- Must caring for a minor son or daughter because the child's school or place of care is closed or unavailable due to a declared health emergency for COVID-19 by a Federal, State, or local authority

- **Emergency Paid Sick Leave**

- All employees—it doesn't matter how long they have been working
- Must be unable to work (or telework) AND
- Must fall into one of six categories
- (1) Employee subject to quarantine from government
- (2) Employee subject to quarantine from health care provider
- (3) Employee has COVID-19 symptoms and seeking diagnosis
- (4) Employee is caring for individual subject to quarantine
- (5) Employee is caring for child because school or childcare is closed for COVID-19
- (6) Employee has another similar condition specified by DHHS

# FMLA Expansion—Benefits

- Partially paid and partially unpaid
- Unpaid leave
  - First 10 days of leave
  - But employee may use any accrued vacation leave, personal leave, or medical or sick leave
  - Employers cannot require employee to use accrued PTO
- Paid leave
  - 10 weeks are paid at least two-thirds of the employee's regular rate of pay
  - Capped at \$200 per day and \$10,000 in the aggregate for entire duration

# Expanded FMLA hour calculation for employee with varying schedule

- The average number of hours the employee was scheduled per day (including hours the employee took for any leave) over the previous 6 months before leave
- If the employee did not work in past 6 months, use the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work



# FMLA Expansion – Hourly Medical Assistant

- Hourly employee's 12 year old child's school closed down by Gov. Whitmer since March 16
- Employee is still allowed to work under shelter-in-place order
- Employee earns \$18/hour and works 8 hours/day and 40 hours/week
- Employee is unable to work at home
- Employee's 10 day waiting period starts April 1 and goes through April 11—during this time the employee can use PTO available
- Starting April 12, the employer must pay the employee \$96/work day
- The child's school is closed through the end of the year, but child care remains closed—the employer must pay the full 10 weeks, for a total of \$4,800

# FMLA Expansion—Salaried Occupational Therapist

- Employee's 12 year old child's school closed down by Gov. Whitmer since March 16
- Employee earns \$80,000/year (\$38.46 an hour for 40 hr/week)
- Employee is still allowed to work under shelter-in-place order
- Employee cannot work from home
- Employee's 10 day waiting period starts April 1 and goes through April 11—during this time the employee can use PTO available
- Starting April 12, the employer must pay the employee \$200/work day (hit the cap)
- The child's school is closed through the end of the year, but child care remains closed—the employer must pay the full 10 weeks, for a total of \$10,000 (cap)

# Employer's other obligations under Expanded FMLA

- Must restore the employee's job when the employee returns
  - Employers with fewer than 25 employees—if the employee's position no longer exists due to economic conditions or other changes in operating conditions caused by a public health emergency during leave THEN the employer does NOT have to restore the employee's employment, but must make reasonable efforts to restore the employee to an equivalent position.
  - Employer must make reasonable efforts to restore the employee to position and if those fail, must contact the person within 1 year beginning the earlier of the date of the qualifying need concludes or 12 weeks after the date on which the employee's leave commences, if an equivalent position becomes available.
- Must continue health care benefits

# Obligations under Emergency Paid Sick Leave Act

- Must pay employees immediately—no waiting period!
- EE must be unable to work (or telework) AND
  - 1. The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19.**
    - This covers the recent shelter-in-place order (unless employer is exempt)
  - 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.**
    - Doctor tells employee to self quarantine because she may have the virus or was in contact with someone who had it
    - Employer could require a note from doctor providing for such a recommendation if it feels that employees may abuse the system
  - 3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.**
    - **and is key here; fair to ask for doctor's note**

# Obligations under Emergency Paid Sick Leave Act

4. The employee is caring for an individual subject to a local quarantine or isolation order or who has been advised by a health care provider to self-quarantine.
5. The employee is caring for the employee's child if the child's school or childcare provider has been closed or is unavailable due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

# Amount of pay under Paid Sick Leave Act

- Full-time: 80 hours paid sick time.
- Part-time: paid leave for number of hours that the employee works, on average, over a 2-week period.
- Contingent or “variable” – average hours over 6 months or expected average schedule.
- For leave having to do with the employee themselves (self care)—100% regular rate of pay
  - Cap: \$511 per day or \$5,100 (total)
- For leave relating to care for another, or for self care for reason “specified by HHS” a condition like COVID-19—2/3rds regular rate of pay
  - Cap: \$200 per day or \$2,000 (total)

# Other considerations for Emergency Paid Sick Leave Act

- Employers are prohibited from requiring—as a condition of giving sick pay—that the employee look for or find a replacement employee
- Employers are prohibiting from requiring an employee to use other paid leave *before* the employee uses the paid sick time under the Act
- Employer cannot discriminate against employee who takes leave under the act or files a complaint/institutes any proceeding related to the Act
- Penalty for not providing sick leave under the Act: the same penalties under FLSA
  - Minimum wage penalty,
  - Owed amount of leave plus the same amount in liquidated damages,
  - Attorney fees,
  - Injunctive relief
- Employer must post a notice approved by DOL (model to be provided)
- Employer may require employees to follow reasonable notice procedures to continue to receive paid sick time

# FMLA Expansion and Emergency Paid Sick Leave working together

- Employee cannot work because child's school is closed
- Emergency Paid Sick Leave could cover 2/3rds of the employee's wages for first 10 days / 80 hours
- FMLA Expansion would cover 2/3rds of the employee's wages for up to 10 weeks



# Intermittent Leave

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- Expanded FMLA
- Emergency Paid Sick Leave

# Front the costs – Tax credits on back end

- Payroll tax credit to help employers cover the cost of wages under the FFCRA
- If the amount of credit exceeds payroll taxes for the quarter, the excess amount is refundable
- 3 components to the credit
  - Wages – 100% of the wages paid under the Emergency Paid Sick Leave Act and the Expanded FMLA are eligible for the credit.
  - Hospital Insurance Tax – The credit is increased by the amount of the Hospital Insurance Tax paid on eligible wages.
  - Health Plan Expenses – The credit is increased by the health plan expenses allocable to the employee during the period of leave. Health plan expenses are amounts incurred to provide and maintain a group health plan, but only to the extent they are excludible from the employee wages.

# FFCRA and Unemployment

- The two do not work together
- FFCRA benefits under either Expanded FMLA or Emergency Paid Sick Leave Act are for employees only
- Unemployment is for former employees (layoff, furlough, termination)

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**QUESTIONS?**

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