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FAMILIES FIRST CORONAVIRUS RESPONSE ACT – SUMMARY/GUIDANCE

The Families First Coronavirus[1] Response Act (Public Law 116-127, hereinafter "FFCRA" or "the Act")[2] was officially signed into law on March 18, 2020, with an effective date of April 1, 2020.[3] The law expires on December 31, 2020 and any FFCRA related paid leave that has not been used will not carry over to the next year.

The FFCRA includes provisions for coronavirus testing, expansion of food assistance and unemployment benefits, as well as provisions for paid sick leave and expansion of the Family & Medical Leave Act (FMLA). This guidance primarily addresses Division C (Emergency Family and Medical Leave Expansion Act) and Division E (Emergency Paid Sick Leave Act) of the FFCRA.

Covered Employers: Notably, this law only applies to employers with less than 500[4] employees. However, the Labor Secretary has been granted the authority to issue regulations "for good cause" to exclude certain health care providers and emergency responders from the definition of "eligible employee," and to exempt small businesses with less than 50 employees "when the imposition of such requirements would jeopardize the viability of the business as a going concern." DOL's Q&A issued 3.24.2020 explains

[1] COVID-19 is also used to refer to Coronavirus herein.
[2] The FFCRA includes supplemental appropriations for a number of programs including nutrition and food assistance, as well as establishing requirements for free coronavirus diagnostic testing, expansion of unemployment benefits, among other provisions. This summary focuses on Divisions C (Emergency Family and Medical Leave Expansion Act) & E (Emergency Paid Sick Leave). The FFCRA also requires OSHA to issue an emergency temporary standard requiring certain employers to develop and implement a comprehensive infectious disease exposure control plan.
[3] See DOL Q&A - https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
[4] Per DOL link referenced in footnote 3, to determine whether the employer employs fewer than 500 employees, the employer "…should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold."

that you should document why your business' viability would be jeopardized but that you should not send any materials to DOL at this time. DOL further updated its Q&A by providing 3 reasons for which a small business may claim this exemption, if determined by an authorized officer of the business that one (or more) of the examples applies. It is important to note that this exemption is applicable to the Emergency Family and Medical Leave and only one of the six qualifying reasons for Paid Sick Leave. Reference Q&A 58 & 59 for more information. https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

FFCRA Division C – Emergency Family and Medical Leave Expansion Act

Eligible Employees: Eligibility for "family leave emergency pay" under Division C, which expands the current requirements of the FMLA, requires employment by the employee for at least 30 calendar days[5] for eligibility. Again, there are possible employer exclusions for healthcare providers or emergency responders.

EMERGENCY FAMILY & MEDICAL LEAVE EXPANSION ACT	
An employee qualifies if unable to work or telework due to a need for leave because the employee…	**Benefit Due**
is caring for a son or daughter whose school or place of care is closed (or child-care provider is unavailable) for reasons related to COVID-19.	• Just like the "regular FMLA," up to 12 weeks of leave may be required, if the qualifying reasons remain in effect. • Although the Act says that the first 14 days (80 hours) may be unpaid, in reality, the 5th qualifying reason for the Emergency Sick Leave applies, and thus if the employee chooses, the employer must pay the at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate. Note that the employee may choose to use other forms of paid leave (PTO/vacation/sick). • This same rate of pay is applicable for the remaining 10 weeks of additional paid leave available under this provision, up to $200 per day and $10,000 in the aggregate.

[5] The CARES Act, signed into law on March 27, 2020 amends the FFCRA and provides this clarification: This includes employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least thirty of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer.

Requirements/Eligibility: This portion of the Act requires covered employers to provide additional leave time to eligible employers when:

- An emergency with regard to COVID-19 is declared by a Federal, State or local authority; AND
- The eligible employee is unable to work *or telework* due to the employee's need to care for a *son or daughter* who is under the age of 18 years, *if the school or place of care of such child has been closed, or the childcare provider of such child is unavailable*, due to the public health emergency.

How much leave is required/available? Just like the "regular FMLA," up to 12 weeks of leave may be required, if the qualifying reasons remain in effect. DOL has clarified that eligible employees are only entitled to take a total of 12 weeks in a 12-month period for FMLA /expanded FMLA qualifying reasons.

https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

Is the leave paid or unpaid?

- **For the first 2 weeks (14 days/10 workdays):** Division C says no pay is required during the first 14 days; however, the employee would be eligible for the paid leave available under Division E (the Emergency Sick Pay Act) since the leave under this expansion of FMLA is for one of the reasons for which the Emergency Sick Leave is available, *to care for a son or daughter if the school or place of care has been closed or the childcare of the provider of such child is unavailable, due to the public health emergency.* One possible caveat here is that such pay would not be available if the employee had already used this emergency sick pay for one of the other eligible reasons.
    - It is also important to note that employers may NOT force an employee to use their accrued vacation/sick/PTO during these first 2 weeks, even though "regular FMLA" does allow employers to require such use. An employee may, of their own volition, choose to use their available PTO/vacation/sick leave, but

again, the employer may not force this. See DOL Q&A 86 https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

- **What about after the first 14 days?** If the employee still requires leave for the Family Leave Emergency Leave qualifying reason, then the employer is required to pay the employee 2/3 of their regular compensation for the number of hours they would regularly have been scheduled to work for the remainder of the leave time.[6] However, this payment is capped at $200/day and $10,000 total.

FFCRA Division E – Emergency Paid Sick Leave Act

Eligible Employees: All employees (except for possible employer exclusion of healthcare providers or emergency responders)[7] may be eligible for emergency sick pay under Division E of the Act.

[6] See DOL Q&A for guidance computing the number of hours you must pay your employee who has irregular hours for each day of expanded family and medical leave taken and Q&A 82 for guidance on computing your employee's average regular rate for the purpose of the FFCRA.

[7] DOL addresses who may be considered "health care providers" or "emergency responders" here: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

EMERGENCY PAID SICK LEAVE ACT	
An employee qualifies if unable to work or telework due to a need for leave because the employee…	**Benefit Due**
1 - is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;	Employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate.
2 - has been advised by a health care provider to self-quarantine related to COVID-19;	
3 - is experiencing COVID-19 symptoms and is seeking a medical diagnosis;	
4 - is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);	Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate.
5 - is caring for a son or daughter whose school or place of care is closed (or child-care provider is unavailable) for reasons related to COVID-19; or	Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate. Note that up to 10 weeks of additional paid leave is available for this reason under the Expanded Family Medical Leave. See Above.
6 - is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.	Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate.

Requirements/Eligibility: This portion of the Act requires employers to pay any employee "emergency sick time" if the employee is unable to work or telework due to any of the following reasons related to COVID-19:

1. The Employee is subject to a Federal, State or Local quarantine or isolation order related to COVID-19.
2. The Employee is advised by a health care provider to self-quarantine related to COVID-19.

3. The Employee is experiencing COVID-19 symptoms and seeking a medical diagnosis.
4. The Employee is caring for an individual who is subject to an order described in #1 above, OR the Employee is caring for an individual who has been advised to self-quarantine, as described in #2 above.
5. The Employee is caring for a son or daughter whose school or place of care has been closed for reasons related to COVID-19, or whose childcare provider is unavailable for reasons related to COVID-19.[8]
6. The Employee is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

How much leave is required/available? Up to 80 hours for full-time employees. For part-time employees, they are eligible for the number of hours equal to the number of hours they work on average, over a 2-week time period. Note that if the 5th qualifying reason applies, the employee may also be eligible for an additional 10 weeks of leave under the Family & Medical Leave Expansion Division of the FFCRA. See Above, FFCRA – Division C.

How much is the employer required to pay the employee under this Division?

- If the Employee needs leave for Reasons 1-3 listed above, the Employee must be paid their regular rate of pay, however, their pay will be capped at $511/day and $5110 in the aggregate.
- If the Employee needs to take leave for Reasons 4-6 listed above, the Employee must be paid 2/3 of their regular rate of pay, capped at $200/day and $2000 total.

[8] Note that the fifth qualifying reason under the Emergency Sick Pay portion of the FFCRA is essentially the same as the qualifying reason for the Emergency Family & Medical Leave Expansion Act.

Additional Requirements Applicable to Both Divisions C & E

Right to Job Restoration/Reinstatement – The FFCRA provisions regarding reinstatement are similar to those in the FMLA; however there is an exception for employers with 25 employees or less, if the position held by the employee no longer exists due to the economic conditions of the employer or other changes in the operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave.

No Discrimination or Retaliation – The FFCRA prohibits employers from discriminating or retaliating against any employee who takes paid leave under the Act, files a complaint or institutes a proceeding under or related to the Act, or testifies (or will testify) in such a proceeding.

Notice/Posting Required – Employers will be required to display a poster. Here is a link to the DOL poster: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Employer Questions & RGCI Answers[9]

Q - How are we going to pay for all this?

Fortunately, the FFCRA provides for a 100% tax credit for employers to apply against their quarterly Social Security tax contributions for wages paid under the FFCRA requirements, as well as properly allocated health care expenses.

Here is a helpful link that includes a lot of information, but specifically to this point, reference *Prompt Payment for the Cost of Providing Leave*:

[9] Note that these responses are based on currently available information. We will update this document as time permits. Please contact an RGCI team member for specific questions.

https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus

More detailed information and Q&A from IRS:

https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

Q – Can employees take this paid leave intermittently?

For reason #5, caring for a child due to school closure, the answer is yes (if the employer chooses to allow it), regardless if the employee is working at the normal worksite or teleworking.

For all other reasons, the answer is yes (if employer wants to allow it) IF the employee is teleworking.

If the employee is working at the normal worksite, intermittent leave is not available to the employee for reasons 1-4 or 6. The goal here is to keep those who are sick, potentially sick or caring for those who are sick out of the workplace.

Refer to Q&A 20, 21 &22: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

Q – What does unable to work or telework mean?

Exactly what does this mean - if I provide my employee with the capability to work at home, the permission to do so and there is work to do, does that mean that they are able to telework and therefore not eligible for paid leave?

Not necessarily. The key word here is “unable”. Regardless of if the employee is working from the normal office or by telework, if the employee is unable to perform their work due to one of the reasons listed in FFCRA, then the employee may be eligible for the leave. The employer and employee may determine that the employee can work the normal hours but outside the normal schedule, thus making the employee able to work and therefore

paid leave is not required. On the other hand, if the employee cannot perform the tasks or work the normal hours due to one of the qualifying reasons, they are entitled to take paid leave.

DOL does state that "to the extent an employee is able to telework while caring for your child, paid sick leave and expanded FMLA is not available." The guidance on this is still vague, confusing and somewhat contradictory.

Q – Does this impact SCA employees differently?

There is nothing in FFCRA to address this. Unless some other guidance is issued, we continue to refer to SCA regulations.

This leave is in addition to other fringe and paid leave requirements. Because this paid leave is mandated, it may not be considered a bona fide benefit toward your H&W calculations.

Must you pay H&W on these hours? The answer is yes and no. It will depend on the type of wage determination you're working with.

- If fixed/odd, yes, you would pay H&W on these hours as you're required to pay H&W on all hours PAID up to 40 in a workweek (or 2080 in a year)
- If average/even, no, you would not pay H&W on these hours as you're required to only pay H&W on hours WORKED – without limit

Remember that if you must furlough or lay off your service employees, that time away from work will likely NOT count as a break in service when determining length of service for vacation vesting and other purposes.

Q- May I ask an employee if he/she or someone in their family has COVID-19? What documentation may we legally request from employees to confirm that the requested leave is actually qualified under the FFCRA?

Yes, you can and should require employees to notify you if they become ill with coronavirus symptoms or if they've been exposed to it. You would need to know so that

you can notify those with whom they have been in contact (without saying who it is) as well as ensure appropriate sanitization measures are implemented. You may also request documentation/doctor's note, but the CDC is asking employers to keep in mind that medical providers will be overwhelmed, and it will be difficult for people to get appointments and documentation. Let us continue to research and provide some suggestions on this. Following is an exert from DOL's Q&A centered around this pandemic and FMLA as it is prior to the new requirements under FFCRA:

> ***May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?***
>
> ***Yes.*** *However, employers should consider that during a pandemic, healthcare resources may be overwhelmed, and it may be difficult for employees to get appointments with doctors or other health care providers to verify they are well or no longer contagious.*
>
> *During a pandemic health crisis, under the Americans with Disabilities Act1 (ADA), an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief – based on objective evidence – that the employee's present medical condition would*
>
> - *impair his ability to perform **essential job functions** (i.e., fundamental job duties) with or without reasonable accommodation, or,*
> - *pose a **direct threat** (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.*
>
> *In situations in which an employee's leave is covered by the FMLA, the employer may have a uniformly-applied policy or practice that requires all similarly-situated*

employees to obtain and present certification from the employee's health care provider that the employee is able to resume work. Employers are required to notify employees in advance if the employer will require a fitness-for-duty certification to return to work. If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.

Q- What if one of our employees tests positive for COVID-19?

We have worked with several clients who have had employees who have tested positive for COVID-19 (fortunately, all such employees have recovered well). We suggest that employers proactively advise their employees of the expectation that, in the interest of the health and safety of their employees and customers, and to avoid or mitigate unnecessary shutdowns or changes in business operations, **management expects and requires employees who feel ill and exhibit symptoms indicative of COVID-19** (for example, fever, shortness of breath, new or worsening cough), **or believe they have been exposed to COVID-19** to report such symptoms and/or exposure to management immediately and then contact their personal physician. The employees' healthcare provider should provide the employee guidance for being tested, if deemed necessary.

If an employee has direct contact with someone who is positive for COVID-19 (such as a family member or co-worker), it is advised that such employee report this exposure to management immediately and get a COVID-19 test as soon as possible. The employee should not return to work until the employee receives a negative test result, or if the employee receives a positive test result, the employee should remain home and follow the instructions below, according to whether or not they have symptoms. Some guidance suggests that, under these circumstances, an employee may return to work but should be required to wear a mask due to their direct exposure, for 5 -10 days. Of course, if symptoms develop, they should get tested again.

If an employee **tests positive for COVID-19 AND has symptoms of COVID-19** – the employee should return to work per the instructions of their doctor. If the employee does

not have a return to work statement from their doctor, they are expected to return once they receive a negative test, or after the following 3 conditions recommended by the CDC have been met*:

(1) The employee has had no fever for at least 72 hours, without the use of fever reducing medicine;
(2) Any respiratory symptoms (such as cough or shortness of breath) have improved; AND
(3) At least 10 days have passed since the first symptoms appeared.

If an employee **tests positive for COVID-19 BUT DOES NOT have symptoms of COVID-19** – the employee should return to work per the instructions of their doctor. If the employee does not have a return to work statement from their doctor, they are expected to return once they receive a negative test, or after the following 2 conditions recommended by the CDC have been met:

(1) At least 10 days have passed since the date of your first positive test; AND
(2) The employee continues to have no symptoms since the test.

You should also ask the Covid-19 positive employee to identify all individuals who worked in close proximity (within six feet) for a prolonged period of time (more than a few minutes) with them in the previous 14 days to ensure you have a full list of those who should be advised of potential exposure. Those employees should consult and follow the advice of their healthcare providers or public health department regarding being tested and the length of time to stay at home. If those resources are not available, the employee should follow the guidelines above for exposure.

When advising employees of potential exposure by a co-worker, do not identify by name the infected employee or you could risk a violation of confidentiality laws. If you work in a shared office building or area, you should inform building management so they can take whatever precautions they deem necessary. The CDC provides that the employees who worked closely to the infected worker “should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).” The CDC provides additional recommendations for most

non-healthcare businesses that have suspected or confirmed COVID-19 cases. https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html

The EEOC previously issued guidance in response to the 2009 H1N1 flu pandemic and has cited it in response to the current COVID-19 pandemic. https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

DOL Q&A 92 addresses an issue of interest to many of our clients:

My employee claims to have tiredness or other symptoms of COVID-19 and is taking leave to seek a medical diagnosis. What documentation may I require from the employee to document efforts to obtain a diagnosis? When can it be required?

In order for your employee to take leave under the FFCRA, you may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. You may not, however, require the employee to provide further documentation or similar certification that he or she sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms. The minimal documentation required to take this leave is intentional so that employees with COVID-19 symptoms may take leave and slow the spread of COVID-19.

Please note, however, that if an employee were to take unpaid leave under the FMLA, the FMLA's documentation requirements are different and apply. Further, if the employee is concurrently taking another type of paid leave, any documentation requirements relevant to that leave still apply.