

## Families First Coronavirus Response Act: Key Takeaways Regarding Paid Leave Benefits

March 18, 2020

On March 18, 2020, Congress passed the **Families First Coronavirus Response Act** (“**FFCRA**”), a sweeping legislative bill to address the growing concerns surrounding the novel coronavirus, COVID-19.

Among the measures included as part of the FFCRA are the Emergency Paid Sick Leave Act (the “**Paid Sick Leave Provisions**”) and the Emergency Family and Medical Leave Expansion Act (the “**Additional Paid Leave Provisions**”), both of which are aimed at expanding paid employee leave in connection with the coronavirus emergency and providing employers with tax credits to cover the cost of those benefits. Both of these measures apply only to employers with fewer than 500 employees, with the apparent expectation that larger employers will have the means and the inclination to provide similar benefits. Under both of these provisions, the Secretary of Labor has authority to issue certain regulations excluding from the requirements certain healthcare providers and emergency responders, as well as small businesses with fewer than 50 employees for whom compliance with the requirements would jeopardize the viability of the business as a going concern.

The Paid Sick Leave Provisions and the Additional Paid Leave Provisions will both become effective no later than 15 days after the date of enactment of the FFCRA and will expire on December 31, 2020.

### Emergency Paid Sick Leave Act

The Paid Sick Leave Provisions require employers with fewer than 500 employees to provide paid sick time to all of their employees (whether full- or part-time and regardless of the employee’s length of employment), where such employee is unable to work (or telework) due to a need for leave because:

- the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19, or is caring for an individual subject to such order;
- the employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, or is caring for an individual that has been so advised;
- the employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- the employee is caring for his or her son or daughter whose school, place of care or child care provider is closed or otherwise unavailable due to COVID-19 precautions; or
- the employee is experiencing any other “substantially similar conditions”, as specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

Under the Paid Sick Leave Provisions, eligible full-time employees are entitled to 80 hours (two weeks) of paid sick leave, and part-time employees are entitled to a number of paid sick leave hours that is equal to the average number of hours that the employee works over a two-week period.

Employees are generally entitled to receive their regular pay rate while using their paid sick leave provided under the Paid Sick Leave Provisions (with the pay rate for employees with a variable schedule to be calculated using an average number of hours determined in accordance with the Paid Sick Leave Provisions), subject to a cap of \$511 per day (and \$5,110 in the aggregate). However, the Paid Sick Leave Provisions provide that an employee is only entitled to two-thirds of his or her regular pay rate in the event the employee utilizes the paid sick time (i) to care for his or her son or daughter or such other individuals under the circumstances described above or (ii) because the employee is experiencing “substantially similar conditions”. In those circumstances, the employee’s pay is subject to a cap of \$200 per day (and \$2,000 in the aggregate).

The Paid Sick Leave Provisions provide that, after the first workday an employee receives paid sick time under the Paid Sick Leave Provisions, an employer may require the employee to follow “reasonable notice procedures” in order to continue receiving the paid sick time benefits; however, the Paid Sick Leave Provisions do not define what those procedures may entail.

The Paid Sick Leave Provisions also include a number of restrictions on covered employers in connection with the paid sick leave benefits, including that the employer cannot:

- require its employees to use existing paid time off prior to utilizing the paid time off provided by the Paid Sick Leave Provisions (i.e., the employee determines the sequencing of the paid sick leave he or she will utilize); or
- terminate, discipline or in any other manner discriminate against any employee who takes paid sick leave under the Paid Sick Leave Provisions.

## **Additional Paid Leave under the Emergency Family and Medical Leave Expansion Act**

The Additional Paid Leave Provisions expand eligibility for paid leave under the Family Medical Leave Act (“FMLA”), by requiring employers with fewer than 500 employees to provide employees (who have been employed for at least 30 calendar days) with 12 weeks of job-protected leave where the employee is unable to work (or telework) due to a need for leave to care for the employee’s son or daughter under the age of 18 whose school, place of care or child care provider is closed or otherwise unavailable due to the coronavirus emergency.

During the 12-week job-protected leave period under the Additional Paid Leave Provisions, the first 10 days of leave may be unpaid—however, during this period, employees may, if eligible, receive paid sick leave under an employer sick leave policy or the Paid Sick Leave Provisions, and they may use any accrued vacation or personal leave. After the 10 days of leave and for the remaining portion of the total 12-week job-protected leave period under the Additional Paid Leave Provisions, an employee’s pay generally cannot be less than two-thirds of his or her regular pay rate (with the pay rate for employees with a variable schedule to be calculated using an average number of hours determined in accordance with the Additional Paid Leave Provisions), subject to a cap of \$200 per day (and \$10,000 in the aggregate).

Following the end of the leave period, the employee is entitled to be restored by the employer to the position of employment held by the employee when the leave commenced, or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment, as provided under the FMLA. However, under the Additional Paid Leave Provisions, this requirement generally does not apply to employers with fewer than 25 employees if a number of conditions are satisfied, including that the employee’s position no longer exists at the end of the leave period due to economic conditions caused by the coronavirus emergency and the employer makes reasonable efforts to restore the employee to an equivalent position.

## **Tax Credits for Qualified Wages Paid under the Sick Leave Provisions and the Additional Paid Leave Provisions**

In order to provide financial assistance to employers, the FFCRA provides employers with a refundable tax credit for federal income tax purposes for qualified leave wages paid by the employer under each of the Paid Sick Leave Provisions and the Additional Paid Leave Provisions, as well as for qualified health plan expenses which are properly allocable to such wages. This tax credit is first applied to reduce an employer’s payment of the employer portion of Old Age, Survivors and Disability insurance taxes (Social Security taxes) (and, if applicable, Railroad Retirement Tax Act taxes (RRTA taxes)). Any excess above the employer’s Social Security taxes and RRTA taxes is provided as a direct tax overpayment refund to the employer.

- For sick leave provided under the Paid Sick Leave Provisions, an employer receives a federal income tax credit for the first 10 days of an employee’s paid sick leave entitlement under the Paid Sick Leave Provisions. The tax credit is limited to \$511 per day (or \$200 per day in instances where the employee utilizes the paid sick time off (i) to care for his or her son or daughter or such other individuals under the circumstances permitted under the Paid Sick Leave Provisions or (ii) because the employee is experiencing “substantially similar” conditions, each as described above).

- For leave under the Additional Paid Leave Provisions, an employer receives a federal income tax credit for the full term of an employee's additional leave up to the 12 months permitted under the Additional Paid Leave Provisions. The tax credit is limited to \$200 per day and \$10,000 in the aggregate for each employee.
- An employer's federal income tax credits will be increased by an allocable portion of the employer's costs to maintain a group health plan that is attributable to such paid leave for which a tax credit is permitted (as described above) to the extent such amounts are excluded from the employees' gross income under Section 106(a) of the Internal Revenue Code of 1986, as amended (the "Code").

In addition, qualified leave wages required to be paid by the employer under each of the Sick Leave Provisions and the Additional Paid Leave Provisions will not qualify as wages for purposes of the employer's Social Security or RRTA tax obligations.

Employers should also be aware that, in order to prevent a "double benefit" to the employer, the FFCRA provides that an employer's gross income will generally be increased by the amount of the new federal income tax credits described above. Furthermore, the credit described above will not be allowed with respect to wages for which an employer is receiving credit under Section 45S of the Code.

## State Legislative Actions

In addition to legislation pending at the federal level, various states have passed or are currently considering legislation which would expand paid leave for individuals affected by the coronavirus emergency. For example, on March 18, the New York state legislature approved legislation providing, among other measures, 5 days of paid sick leave applicable to employers with 11 to 99 employees and 14 days of paid sick leave applicable to employers with 100 or more employees. Similar legislation has also been passed or is also currently being considered in California, Michigan, New Jersey, Maryland, Hawaii, Minnesota and Washington.

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