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Updated Families First Coronavirus Response Act Alert

DEPARTMENT OF LABOR TO HOLD UNPRECEDENTED NATIONAL ONLINE DIALOGUE THROUGH SUNDAY MARCH 29, 2020,

ANNOUNCES A CHANGE IN THE EFFECTIVE DATE TO APRIL 1, 2020,

RELEASES NOTICE POSTERS FOR EMPLOYERS,

AND DEFINES “GOOD FAITH” EFFORTS TO AVOID PENALTIES

On March 18, 2020, Congress passed the Families First Coronavirus Response Act (FFCRA). The FFCRA temporarily expands FMLA benefits and created Emergency Paid Sick Leave. Most notable, the Department of Labor (DOL) announced it would be issuing/implementing regulations in the coming weeks, published the mandated notice posters for employers, and changed the widely speculated effective date for the benefits period under the Act from April 2, 2020, to **April 1, 2020**. Weber Gallagher had previously provided a client alert regarding the FFCRA and now offers this supplemental alert to address the guidance provided by the DOL on March 24, 2020.

- In general, employees of private-sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (Emergency Paid Leave Section below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave to help care for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons.
- The FFCRA's paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.
- Private sector employers are only required to comply with the Acts if they have fewer than 500 employees.
- An employer has fewer than 500 employees if, at the time, its employee's leave is to be taken, it employs fewer than 500 full-time and part-time employees within the territorial United States. The Fair Labor Standards Acts rules for determining single or joint employer status apply.
- The DOL notice posters are available [here](#).
- Employees may be eligible for both types of leave available under FFCRA, but only for a total of twelve weeks of paid leave. It appears the calculation of 12 weeks of paid leave equates to sixty days of paid leave, but the forthcoming regulation may address “stacking” benefits and managing intermittent leave requests.
- The Emergency Paid Sick Leave benefits cannot be used more than once, even if employees are eligible under different categories.
- Employers cannot deny paid sick leave benefits beginning April 1, 2020, if they've already provided benefits before April 1, 2020, and the Act is not retroactive.
- Every dollar of required paid leave (plus the cost of the employer's health insurance premiums during leave) will be 100% covered by a dollar-for-dollar refundable tax credit available to the employer.

Documentation & Record Keeping

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- The DOL advises that under the EPSLA: Employers must require employees to provide them with appropriate documentation supporting the reason for the leave, including the employee's name, qualifying reason for requesting leave, stating that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested and documentation confirming the source of any quarantine or isolation order, or the name of the health care provider who has advised the employee to self-quarantine. For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to the concerns associated to COVID-19. If employers intend to claim a tax credit under the FFCRA for payment of the sick leave wages, they should retain this documentation in their records. Employers should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.
- Under the Emergency Family and Medical Leave Expansion Act (EFMLEA): If an employee takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, under the EFMLEA, they must require the employee to provide them with appropriate documentation in support of such leave, just as you would for conventional FMLA leave requests. For example, this could include a notice posted on a government, school, or daycare website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider. This requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason. If employers intend to claim a tax credit under the FFCRA for the expanded family and medical leave, they should retain this documentation in their records. Employers should consult IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.

Exemptions from the Act:

- The Small Business Exemption applicable to employers with less than 50 employees will be explained in the coming regulations.
- The Act has an opt-out provision for "HEALTH CARE PROVIDERS" AND "EMERGENCY RESPONDERS" (See section 3105 of the EFMLEA and section 5102 of the EPSLA). Health care providers are a term of art within the Act defined consistent with the FMLA. The Act does not define Emergency Responder, so at the moment, it is subject to interpretation, pending further guidance from the DOL.

Join the National Dialogue:

- The DOL is hosting a national online dialogue, Providing Expanded Family and Medical Leave to Employees Affected by COVID-19, to help understand the FFCRA. You can register to participate [here](#).
- The DOL is encouraging the public, stakeholders, employers, workers, and their advocacy groups to participate in this national online dialogue through Sunday, March 29, 2020.

Guidance on “good faith” compliance and penalties:

- The DOL has issued guidance on penalties for non-compliance with the Act as follows:
- Employers in violation of the first two weeks paid sick time, or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of paid leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act.
- The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act.
- For purposes of this non-enforcement position, “good faith” exists when violations are remedied, and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

The Emergency Family & Medical Leave Expansion Act (EFMLEA)

This Act is an amendment to the Family and Medical Leave Act of 1993 (FMLA). The FMLA applies to private and public employers of 50 or more employees and provides eligible employees with up to 12 weeks of unpaid protected leave. To qualify for FMLA protected leave, an employee must be employed by the employer for at least one year or has worked 1,250 hours.

Here is how the EFMLEA expands the FMLA protections:

- An employee employed for only 30 days by an employer of 50 or more employees is eligible for protected leave.
- The first 10 days of the qualifying leave can be unpaid. An employee can elect to use accrued sick, vacation, or personal leave; however, the employer cannot require the employee to substitute paid leave.
- After that, up to 10 weeks of qualifying leave is required to be paid by the employer at 2/3 the employee’s regular pay rate. The amount of pay cannot be more than \$200.00 per day or \$10,000.00 in the aggregate.
- The job-protected leave is for “a qualifying need related to a public health emergency” only.
- “Qualifying need” is only the following: an employee is unable to work or telework due to a need to care for a child under the age of eighteen (18) if the child’s school or place of care has been closed or is unavailable due to a public health emergency.
- “Public health emergency” means an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

The Emergency Paid Sick Leave Act

This Act provides emergency mandatory paid sick leave time for employees who are unable to work or

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telework due to COVID-19. Employers are required to provide up to 80 hours (two weeks) of paid time for full-time employees. For part-time employees, employers are required to pay the number of hours that is equal to the employee's average hours over a two-week period.

This benefit would be immediately available to employees regardless of how long an employer has employed the employee. An employer may not require an employee to use other paid leave before using emergency paid sick leave, and the leave will not carry over from one year to the next.

Eligible employees are those who are experiencing one of these six situations:

- Subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- Advised to self-quarantine due to the concerns associated with COVID-19.
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis.

The amount of pay for employees eligible under the above three categories cannot be more than \$511.00 per day or \$5,110.00 in the aggregate.

- Caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised to self-quarantine due to the concerns associated with COVID-19.
- Caring for a son or daughter of such an employee if school or place of care has been closed, or the child care provider is unavailable, due to COVID-19.
- Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The amount of pay for employees eligible under the above three categories cannot be more than \$200.00 per day or \$2,000.00 in the aggregate.