

FFCRA UPDATE: SENATE APPROVES REVISED FAMILIES FIRST CORONAVIRUS RESPONSE ACT, IMPACTING SICK LEAVE AND PAY

On Wednesday, Congress passed an amended version of the Families First Coronavirus Response Act (“FFCRA”). This legislation, which President Donald Trump is expected to sign in short order, contains substantial revisions from an earlier version of the bill passed by the House of Representatives on Saturday morning. Like the bill’s previous version, the updated FFCRA applies only to employers with fewer than 500 employees. Employers’ obligations would become effective within 15 days of enactment and would automatically expire on December 31, 2020. While a more detailed analysis follows, the highlights of the law provide certain employees with 10 days of paid sick leave for various Coronavirus related absences from work. Further, some employees forced to stay home to care for children are entitled to FMLA leave at 2/3 pay.

The FFCRA's provisions include the following:

Emergency Paid Sick Leave Act

These provisions of the FFCRA require employers with fewer than 500 employees to provide full-time employees (regardless of how long the employee had been employed prior to the leave) with **80 hours of paid sick leave**. Part-time employees receive only the number of hours they have worked over an average two-week period.

These leave benefits are available only to employees who are absent from work for reasons related to Coronavirus. Specifically, to qualify for the paid-leave benefits under this Act, an employee’s leave must be for one of the following purposes:

1. The employee is subject to a government quarantine/isolation order related to Coronavirus;
2. The employee has been advised by a health care provider to quarantine for Coronavirus concerns;
3. The employee is experiencing symptoms of Coronavirus and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order as described above or has been advised by a health care provider as described above;
5. The employee is caring for a son or daughter if the child’s school or place of care has been closed or the child’s child care provider is unavailable due to Coronavirus precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employees who need leave to care for themselves are entitled to their full regular rate of pay for the number of hours they would work per day. However, employers are now allowed to cap this amount of paid benefits at \$511 per day (\$5,110 aggregate) per employee. Employees who need leave to care for others—including children home from school or without childcare—are entitled to only 2/3 of their regular rate of pay (or the applicable minimum wage, if greater). The amount of paid sick leave for this leave is capped at \$200 per day (\$2,000 aggregate) per employee.

Significantly, employers must provide these benefits *in addition to* any existing paid leave benefits. In other words, employees are entitled to exhaust all available emergency paid leave provided by this Act before they are required to use any otherwise available leave benefits their employer may offer.

The Act does not address employers' right to request certification or documentation from employees in need of leave. However, the Department of Labor regulations may address this issue at a later time.

Emergency Family Medical Leave Expansion Act

The FFCRA also contains an expansion of the Family Medical Leave Act ("FMLA") to provide for leave needed for childcare purposes. This FMLA expansion covers all employers with fewer than 500 employees, not just employers of 50 or more employees. However, the law does grant discretion to the Secretary of Labor to exempt employers with fewer than 50 employees from the Act's provisions. It also lowers the eligibility threshold to employees who have worked for only 30 days (or more).

Specifically, this Emergency FMLA leave is available to eligible employees to care for the employee's child (under 18 years old) if the child's school or place of care is closed, or the child's child care provider is unavailable, due to a public health emergency.

Employers may provide the first 10 days of this leave without pay. While employees can elect to substitute or use otherwise accrued paid leave during these initial 10 days, employers may not require employees to do so, no matter how their policies may read. Employees could elect to use their paid sick leave provided by the Emergency Paid Sick Leave Act above for this time to be paid. After this initial 10-day period, employers must provide additional paid leave to their employees for the remaining 10 weeks, but only at two-thirds of the employee's regular rate of pay for the number of hours the employee would normally be scheduled to work. The amount of pay during these 10 weeks is capped at \$200 per day (\$10,000 aggregate) per employee.

Employees are required to give their employers as much notice as practicable when this type of leave is foreseeable. Like the Emergency Paid Sick Leave Act, the FMLA Expansion does not include any reference to an employer's right to request certification or documentation of an employee's need for leave, though Department of Labor regulations may subsequently address this issue.

Employer Tax Credits

The FFCRA also provides for a refundable tax credit to employers for 100% of the qualified sick leave wages paid to their employees (described above). These tax credits would be provided on a quarterly basis and are allowed against the employer's Social Security taxes.

What Does This Mean For Your Business?

For employers with fewer than 500 employees, the FFCRA obviously imposes new paid-leave requirements for certain employees. Although larger employers are not bound by the legal obligations set forth in this legislation, they should become familiar with the terms of this law to assist in formulating voluntary, temporary internal policies and answering questions from employees.

Employers must also remain aware that the FFCRA's paid-leave obligations are **supplemental** to existing federal employee leave laws. In other words, employers are still bound by traditional FMLA and ADA analyses for employees with qualifying health conditions. For example, although an employee diagnosed with Coronavirus may not qualify for paid leave under the FFCRA's expanded FMLA paid leave, that same employee may have a "serious health condition" under traditional FMLA analysis, which would entitle the employee to unpaid, job-protected leave. In sum, employers must view these new FFCRA obligations in conjunction with existing federal, state, and local leave laws when examining their employees' rights to protected leave. While circumstances remain fluid, we will continue to monitor further proposed legislation and its potential effects on employers.

Please reach out to your contacts in the Firm's [Labor & Employment Practice](#) if you have any questions or comments about your employee leave provisions and obligations in light of these legislative proposals.

Maynard Cooper's COVID-19 Coronavirus Task Force is closely monitoring all updates to pending legislation related to the Coronavirus pandemic. We are dedicated to providing client-focused services, and it is the goal of the Task Force to continue this level of service to each and every client as they face challenges about planning for and responding to the threats posed by the virus. If you have any questions, please reach out to your relationship partner or any of the lawyers serving on the Task Force.

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