

US Emergency Paid Leave Bill: New Relief To Mitigate COVID-19's Economic Impact

The legislation would enact coronavirus-related paid leave requirements that would affect many employers, but important questions remain.

Key Points:

- As currently drafted, the bill would impact employers with one to 499 employees, and would be effective through 2020.
- Employees would receive up to a total of 14 weeks off, with 12 weeks of paid leave.
- Leave under the bill could be used for self-quarantine, illness-related purposes (including taking care of a family member who is ill), and in the event that an employee is affected by a school closure or child care becomes unavailable due to the coronavirus.
- Employers could offset their costs under the bill with a refundable tax credit against their portion of quarterly Social Security tax payments.
- The legislation's interaction with existing employer policies and with state and local requirements is uncertain.

The Families First Coronavirus Response Act, [H.R. 6201](#) (FFCRA), passed by the House of Representatives on March 14, 2020, contains important provisions concerning unprecedented mandatory paid leave applicable to many employers. While the FFCRA has yet to be enacted, observers believe it has the support of the President and will likely become law in some form, subject to revisions as the bill moves through the legislative process. Nonetheless, if enacted in its current form, the FFCRA would establish new temporary paid leave requirements for employers with as few as one employee but no more than 499. This *Client Alert* describes the FFCRA as currently proposed. Whether additional legislation covering larger employers will follow is uncertain.

Key Elements of the FFCRA

The FFCRA serves to provide eligible employees with both paid sick leave and paid leave under the federal Family and Medical Leave Act (FMLA) in a manner that is unprecedented in the United States.

Following the enactment of the FFCRA, an eligible employee may be entitled to two weeks of paid leave pursuant to the emergency paid sick leave provisions of the statute, followed by an additional 10 weeks of paid leave pursuant to temporary paid leave expansions under the FMLA (for a total of up to 12 weeks of paid leave).

In order to help employers finance these new temporary paid leave requirements, the FFCRA provides refundable tax credits against the employer's portion of its quarterly Social Security tax payments made during each such calendar quarter for amounts paid for FMLA and sick leave taken under the FFCRA.

Federally Mandated Paid Leave Coverage

- *Even small employers will be required to provide paid leave.* Employers with fewer than 50 employees generally are exempt from the job-protection leave requirements under the FMLA. The FFCRA will, subject to limited exceptions, impose new paid family and medical leave provisions of the FMLA and paid sick leave provisions on all employers with as few as one employee but no more than 499 employees.¹
- *Eligibility requirements for employees are minimal.* Under the FFCRA, employees who have been employed by the applicable employer for at least 30 days will generally be eligible for paid family and medical leave under the FMLA.² Further, there is no minimum service requirement for employees to use two weeks of paid sick leave.

Paid Family and Medical Leave

- *Events triggering paid family and medical leave.* Pursuant to the FFCRA, employers will be required to provide up to 12 weeks of job-protected leave under the FMLA to eligible employees:
 - To comply with orders or recommendations of public health officials or a health care provider not to attend work if the employee:
 - Has been exposed to or has symptoms of the coronavirus and their presence would jeopardize the health of others; and
 - Is unable to both perform the job functions of their position and comply with the order or recommendation
 - To care for a family member whose presence in the community has been determined by a public health official or health care provider to potentially jeopardize the health of other individuals due to exposure to, or existence of symptoms of, the coronavirus
 - To care for the employee's child (under age 18) if the child's school³ or place of care has been closed, or the child-care provider⁴ is unavailable, due to the coronavirus-related public health emergency
- *Timing and amount of paid leave.* Leave is unpaid for the initial 14-day period. Employees may elect to use available paid leave, such as accrued sick and vacation time, as a substitute for the first 14 days of unpaid leave, but employers may not require employees to do so. After the initial 14-day period, the employee must be paid during the remainder of the leave (up to 10 total paid weeks) at no less than two-thirds of his or her regular pay rate based on the number of hours regularly worked by the employee.
- *Reinstatement Exemption.* The FFCRA will exempt employers with fewer than 25 employees from the reinstatement requirements of the FMLA if, at the end of the leave, the position held by the employee upon commencement of leave does not exist due to changes in operating conditions of the employer that affect employment and are caused by the public health emergency. However, the employer must make reasonable efforts to reinstate the employee to an equivalent position with equivalent pay,

benefits, and other terms and conditions of employment; if unable to do so, the employer must contact the employee if such a position becomes available within one year following the earlier of the end of the leave or the 12-week period after the employee's leave begins.

Additional Paid Sick Leave on Top of FMLA

- *Events triggering additional paid sick leave.* In addition to the family and medical leave under the FMLA, employers with fewer than 500 employees must also provide up to two weeks' additional paid sick leave to be used for any of the same reasons outlined above for FMLA leave, but also to:
 - Obtain a medical diagnosis or care if experiencing symptoms of the coronavirus
- *Amount of additional sick leave.* Full-time employees receive 80 hours of paid sick leave. Part-time employees receive an amount equal to their average number of hours over a two-week period. Sick leave does not carry over year-to-year, and unused sick pay is not required to be paid out upon termination. Employers may not require employees to use existing paid sick leave under the employer's policy prior to using paid sick leave under the FFCRA. Sick leave under the FFCRA will be *in addition* to paid sick leave available under existing company policies, and an employer may not change its policies to avoid providing the additional paid sick leave under the FFCRA.
- *Rate of pay during additional sick leave.* Sick leave for an employee's quarantine or treatment is paid at their regular rate of pay. Sick leave to care for family members is paid at a minimum of two-thirds of the employee's regular rate of pay. The FFCRA prohibits retaliation against employees using sick leave.

Other Key Terms

- *Effective date.* These FMLA paid leave and paid sick leave requirements will go into effect no later than 15 days after the FFCRA is enacted and are set to expire on December 31, 2020.
- *Tax Credits.* The FFCRA provides refundable tax credits against the employer's portion of the quarterly Social Security tax payments for payments made in each quarter for paid FMLA and sick leave taken under the FFCRA. Special rules apply to self-employed individuals that extend the tax credit framework to these individuals. The Department of the Treasury is directed to provide regulations or other guidance to carry out the tax credit construct.
 - The amount of the tax credit is generally equal to 100% of the qualified sick leave wages and qualified family leave wages paid by the employer with respect to the calendar quarter, up to a per-employee cap of US\$511 per day for qualified sick leave wages (up to US\$7,154 in total) and US\$200 per day for qualified family leave wages (up to a maximum of US\$10,000 in total).
 - If the aggregate amount of qualified sick leave wages and qualified family leave wages paid by the employer with respect to a calendar quarter exceeds the employer's portion of the quarterly Social Security tax payments payable with respect to all employees, the excess will be treated as an overpayment and will result in a refund for the employer.
 - Employers cannot "double dip" by claiming both a deduction for qualified sick leave wages and qualified family leave wages and the applicable tax credits.

- *Compliance for unionized employees.* Employers that are parties to multi-employer collective bargaining agreements may satisfy these requirements through contributions to funds, plans, or programs providing for such paid leave under the multi-employer collective bargaining agreements.
- *Employee notice.* Employers will be required to post and keep posted, in conspicuous places on their premises, a notice of the paid sick leave requirements described under the FFCRA. The Secretary of Labor will make a model notice available no later than seven days after the enactment of the FFCRA.

Important Unanswered Questions

The legislative process surrounding the FFCRA remains fluid, but the current proposal raises many questions for employers that will hopefully be resolved in the coming days. The questions include:

- Does extended paid family or medical leave offered by certain employers count against the paid FMLA requirements of the FFCRA?
- Can employees elect to use available paid sick leave or vacation time to supplement payments of less than 100% of their regular wages during FMLA leave or paid sick leave to care for family members under the FFCRA? The language of the employer's existing paid leave policies may impact this question.
- If existing policies or state and local requirements count against the FFCRA's requirements, how will that impact the tax credit?

Next Steps

While the FFCRA has not yet become law, employers may wish to take certain steps in advance to prepare for its effectiveness. In particular, employers may wish to consider the following:

- Be prepared to implement the FFCRA when it becomes law by:
 - Reviewing existing paid leave policies for their coordination with the FFCRA
 - Consider drafting communications to employees and updating them as needed when the FFCRA is final — in most cases, this may require a supplement to current sick leave and FMLA policies and the posting of notices regarding the same
 - For employers with fewer than 50 employees that do not have experience with the FMLA, consult a Latham & Watkins lawyer for advice
 - Posting the required notice of employees' rights under the FFCRA
- Maintain records of the payment of leave under the FFCRA for tax reporting purposes.
- Watch for updates on the FFCRA

Latham will continue to monitor and advise on developments in this area.

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Endnotes

¹ The Secretary of Labor, on a case-by-case basis, is authorized to issue regulations to exempt an employer with fewer than 50 employees from the paid leave requirements to the extent such leave could jeopardize the viability of its business as a going concern.

² The Secretary of Labor is authorized to issue regulations to exempt certain emergency responders and healthcare providers.

³ "School" is limited to elementary and secondary schools, and does not include colleges or universities.

⁴ "Child care provider" means a provider who receives compensation for providing child care services on a regular basis.