



# **The Families First Coronavirus Response Act: What Employers Need to Know**

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## Agenda

- Coronavirus Update
- Practical Applications of Public Health Emergency FMLA Leave under the Families First Coronavirus Response Act (FFCRA)
- Practical Applications of Emergency Paid Sick Leave Under the FFCRA
- How are Employers Responding?

## FMLA Expansion Summarized in a PowerPoint Slide

- FFCRA expanded FMLA rights to employees to care for a son or daughter (under 18) where the child's school is closed or the child's regular childcare provider is closed due to COVID-19.
- The expanded FMLA rights apply to all employers with fewer than 500 employees and all governmental employers.
- Eligible employees are those who worked for the employer for at least 30 days.
- First 2 weeks of leave are unpaid; remaining leave is paid at 2/3 regular rate.
- Exceptions:
  - Secretary of Labor may consider exempting employers with fewer than 50 employees who can show providing the leave would cause the business to no longer be a going concern can opt out.
  - Employers of employees who are health care providers or emergency responders can deny leave to such individuals.



## Easy, right?

- Open Questions:
  - How much leave is guaranteed?
  - What constitutes an employer? What if I have multiple business operations?
  - What if parents both work for me; do they have separate entitlements?
  - When is this effective?
  - Intermittent Leave?
  - Other considerations?



## How much leave is guaranteed?

- FMLA provides 12 weeks of leave (in the aggregate for the following):
  - Birth or placement of a child;
  - Serious health condition of employee;
  - Care for the serious health condition of family member;
  - Serious illness or injury of a covered service member or covered veteran;
  - Qualifying exigencies of a covered military member; or
  - Care for a child whose school or childcare facility is closed due to COVID-19.
- Leave rights are not extended based upon this new reason.
- Employee who has used FMLA already for a different reason does not get a new leave right.
- Employee currently on leave may seek to change it based upon the pay element of the new leave right. Employers should be prepared for this.

## What constitutes an employer? What if I have multiple business operations?

- Normally, the legal entity which employs the employee is the employer under FMLA.
- Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the integrated employer test or joint employment test.
- Integrated Employer Test:
  - Not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:
    - Common management;
    - Interrelation between operations;
    - Centralized control of labor relations; and
    - Degree of common ownership/financial control.



## What constitutes an employer? What if I have multiple business operations?

- Joint Employer Test:
  - Not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality.
  - Factors considered in determining whether two or more entities are a joint employer include:
    - The businesses exercise some control over the work or working conditions of the employee.
    - Employee's work simultaneously benefits two or more employers or employee works for two or more employers at different times during the workweek.

## Joint Employers (cont.)

- Joint employment relationship generally will be considered to exist in situations such as:
  - There is an arrangement between employers to share an employee's services or to interchange employees;
  - One employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,
  - The employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.
- Joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.
- Under regulations, each employer counts the employee in their employee count.
  - Because employers over 500 are exempt from new benefit, it is unclear whether DOL will utilize this practice for School Leave benefit.

## **What if parents both work for me; do they have separate entitlements?**

- Yes.
- In 2008 regulations, the Same Employer Limitation was added to specific leave entitlements. It applies to:
  - Leave for bonding.
  - Leave to care for parent.
  - Leave to care for serious illness or injury of a covered service member / veteran.
- Consider definition of “care” is broad.
- Absent clarity from DOL, do not impose a restriction on parent.



## Intermittent Leave?

- Intermittent leave is governed by regulation.
- Regulations provide intermittent leave where there is a medical necessity or qualifying exigency.
- Intermittent leave not available for bonding of healthy child absent an employer's consent to do it.
- Circumstances of employer's needs may warrant providing on this basis, but not referenced in the enabling act.



## When is this effective?

- Effective date in the Act referenced that this becomes effective within 15 days of enactment.
  - Not later than April 2, 2020
  - On March 20, 2020, the agencies referenced the tax credit had become effective. Because the tax credit was not effective for leave that was not “required” it appears that it is now effective.
- No Private Right of Action for employers with fewer than 50 employees.
- Non-Enforcement Period
  - On March 20, 2020, the Department of Labor announced it will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act.
  - Under this policy, Department of Labor will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with the Act. The Department of Labor will instead focus on compliance assistance during the 30-day period.



## Certification of the Need for Leave?

- Generally employers only certify serious health conditions and, sometimes, need for military leave.
- FMLA provides, however, the ability to request further information to determine whether the employee's request for leave is FMLA qualified.
- Employee's failure to respond to the employer's questions can result in the delay or denial of FMLA leave.
- For this new leave right:
  - Governor's order closing schools likely sufficient.
  - Daycare notice of closing.
  - Proof of a child relationship? Did you even know they have a child?



## Other considerations?

- Part-time employees are eligible.
  - 1250 hours and 12 months not required to get protections of this law.
- Continuation of group health plans.
- Reinstatement.
  - Employers under 25 employees have special rights.
- FMLA forms will need to be modified.
  - Eligibility/Rights and Responsibilities Notice
  - Designation Notice
  - Inking standard
- Employee Notice Requirements
  - Update policy – distribute poster



## Emergency Paid Sick Leave

- This provision of the FFCRA goes into effect no later than **April 2, 2020**.
- **New Rule:** Employers with fewer than 500 employees must provide 80 hours of paid sick leave (or 10 days of paid sick leave for hourly employees).
  - Employees paid on a variable basis have a special formula for calculating the equivalent of 80 hours or 10 days of paid leave.



## Who is Qualified to take Emergency Paid Sick Leave?

Employees:

- subject to a federal, state, or local quarantine or isolation directive related to COVID-19;
- advised by a healthcare professional to self-quarantine due to concerns about COVID-19;
- experiencing symptoms of COVID-19 that are actively seeking a medical diagnosis;
- caring for an individual who is subject to quarantine or isolation directive or otherwise advised by a healthcare professional to self-quarantine;
- experiencing symptoms of any other condition that are substantially similar to COVID-19, as specified by the U.S. Department of Health and Human Services; or
- caring for a minor child whose school or childcare provider is closed or unavailable due to COVID-19 precautions.



## How much is Paid for Emergency Sick Leave?

- **Employees who care for themselves** related to COVID-19 will be paid their regular rate of pay or \$511 per day of leave (whichever is less).
- **For any other permitted reason**, including childcare, will be paid 2/3 their regular rate of pay or \$200 per day of leave (whichever is less).



| Reason for Emergency Sick Leave   | Pay Rate Per Day of Leave |
|---|---------------------------|
| Employees subject to a federal, state, or local quarantine or isolation directive related to COVID-19   | Regular rate or \$511     |
| Employees advised by a healthcare professional to self-quarantine due to concerns about COVID-19  | Regular rate or \$511     |
| Employees experiencing symptoms of COVID-19 that are actively seeking a medical diagnosis;  | Regular rate or \$511     |
| Employees caring for an individual who is subject to quarantine or isolation directive or otherwise advised by a healthcare professional to self-quarantine;        | 2/3 rate or \$200         |
| Employees experiencing symptoms of any other condition that are substantially similar to COVID-19, as specified by the U.S. Department of Health and Human Services | 2/3 rate of \$200         |
| Employees caring for a minor child whose school or childcare provider is closed or unavailable due to COVID-19 precautions  | 2/3 rate or \$200         |



## Refundable Tax Credit to Employers

- Employers who pay Emergency Sick Leave under the FFCRA can receive a tax credit against taxes imposed on the employer portion of Social Security and Railroad Retirement payroll taxes.
- This credit will be for the actual amount paid to employees, based on the statutory maximum payouts.
- Employers also may be entitled to a tax credit for healthcare premiums paid by the employer during an employee's Emergency Sick Leave.



## Other Considerations Regarding Emergency Sick Leave

- Employers must notify employees of their rights under the FFCRA.
  - A model notice/ labor poster is set to be published on March 25, 2020.
- After first day of paid sick time, an employer may require an employee to follow reasonable notice procedures to continue paid sick leave.
- Employers may **not** require an employee to use other paid sick leave *before* using FFCRA paid sick leave.
- Paid sick time does **not** carry over from one year to the next.
- Employers are prohibited from discharging, disciplining, or discriminating against an employee who uses such leave benefits under the FFCRA.

## How are employers responding?

- Reducing workforce size to manage anticipated costs.
  - RIFs; Layoffs; Furloughs
  - Employees would receive unemployment insurance benefits.
- Reducing hours worked where possible to minimize costs.
- Wage reductions.
- For employers who are near the 500-employee threshold, two approaches:
  - (1) Reduce workforce size prior to effective date of the law and rely on tax credits to be reimbursed for leave expenses.
  - (2) Stay above the threshold to fashion own leave policies, though not reimbursed by tax credits.



## Michael Best COVID-19 Resources

- COVID-19 Resource Center:  
<https://www.michaelbest.com/Practices/COVID-19-Resource-Center>
  - Access to all COVID-19 client alerts
  - View upcoming COVID-19 webinars
  - Contact information for Task Force members
- Subscription options to Michael Best and Michael Best Strategies Alerts
  - Michael Best Alerts: <https://sites-michaelbest.vuturevx.com/5/9/landing-pages/subscription-form.asp?sid=blankform>
  - Michael Best Strategies Alerts: <https://www.michaelbeststrategies.com/connect/washington-d-c/#signup>

**Michael Best**

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**COVID-19 and Construction Projects: Who is responsible for Delays and Cost Increases?**

As the country braces for the continued spread of COVID-19, the disruptive effects of this virus are already evident as enumerable events, business, and schools shut their doors. This disruption is also likely to impact the construction industry in the form of labor availability, delays, and costs overruns.

The coronavirus' impact on global supply lines is expected to be significant. Michael Best partner Joseph Olson writes [HERE](#) about practical steps to consider to remedy supply line issues. China is one of the largest exporters of building materials. Data recently released by the Chinese government shows a 17.2 percent decline in Chinese exports compared to this time last year. Construction suppliers will likely soon feel the strain of supply shortages, followed shortly thereafter by contractors unable find the construction materials, parts, and components required to complete projects. In these scarcity situations, a contractor's limited option may be to locate more expensive replacements consistent with the contractual terms, where the contractor might be required bear the increased costs associated with replacement parts.

The availability of labor will also suffer under the effects of COVID-19. While the current number of confirmed cases of COVID-19 in the U.S. remains somewhat manageable, health officials are signaling that a sharp increase in the number of confirmed cases and related quarantines is expected in the upcoming weeks. Contractors and project owners can reasonably expect that the virus will add insult to injury, as labor shortages throughout the construction industry are already a well know problem (read Associated General Contractors article [HERE](#)). Similarly, certain "crowded" projects may be impacted, if the site is shut down. Owners

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## Questions





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