

What Employers Need to Know About the Families First Coronavirus Response Act

March 23, 2020

With the rapid increase of confirmed coronavirus (“COVID-19”) cases across both the United States and North Carolina, it is clear that COVID-19 will have a substantial impact on business operations. The decreased activity from social distancing measures, coupled with home confinement recommendations from government officials, has led to concerns from employers about lower business and consumer spending. As a result, employers have already begun considering (and in many cases implementing) salary reductions, furloughs, and even layoffs.

Concurrently, federal and state officials have taken various measures to alleviate the potential harm to impacted businesses, workers and families. This article provides an outline of recent announcements and serves as an initial FAQ to help employers understand some of their options and obligations in light of these measures.

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (the “FFCRA”) into law.

The FFCRA provides emergency paid sick leave and public health emergency leave for covered employees who have been affected by the epidemic. Among other things, the FFCRA: (1) expands the job-protected leave under the Family and Medical Leave Act to provide paid leave for certain absences related to caring for children whose schools or daycares have closed; (2) requires covered employers to provide paid sick leave for certain COVID-19-related absences; (3) provides employers with tax credits to offset the costs of this paid leave; and (4) provides grants for eligible states’ unemployment insurance programs.

These provisions of the FFCRA will go into effect on April 1, 2020 and

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will remain in effect until December 31, 2020.

The Emergency Paid Sick Leave Act

- **What is the Emergency Paid Sick Leave Act (“EPSLA”)?**

The EPSLA is a law contained within the FFCRA that provides employees with paid sick leave under certain specified circumstances.

- **Who qualifies as a “covered employer” under the EPSLA?**

If you are a private entity or individual engaged in commerce or any industry or activity affecting commerce *and* you employ fewer than 500 employees, you fall within the definition of a “covered employer” under the EPSLA. Public agencies are also “covered employers.”

- **Which employees are eligible for paid leave?** Full-time and part-time employees are eligible for leave, regardless of how long they have worked for the covered employer, who are 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;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is 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 concerns related to COVID-19;
- The employee is caring for a son or daughter of such employee whose school or place of care has been closed, or the regular childcare provider of such child is unavailable, due to COVID-19 precautions;
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. Note, however, that it is not clear exactly what this provision will cover at present.
- *Note:* An employer of an employee who is a health care provider (including physicians, physician assistants, and nurse practitioners but not nurses or technicians) or of an emergency responder may elect to exclude such employees from sick leave under the Act.

- **How much paid sick leave must be provided?** Eligible full-time employees are entitled to eighty hours of paid sick leave. Eligible part-time employees are entitled to paid sick leave equal

to the number of hours that they work, on average, over a two-week period. This leave is referred to as emergency paid sick leave.

- **What is the required compensation for eligible employees taking this paid sick leave?** For the employee's own COVID-19-related absence, employers are required to pay the greater of (1) the employee's regular rate of pay or (2) the minimum wage at the applicable federal, state, or local level. However, an employee's leave for the care of a family member or child is paid at two-thirds of such amount. Sick leave pay for the employee's sickness-related absence is capped at \$511 per day (\$5,110 in total), and the cap is \$200 per day (\$2,000 in total) for the employee's care for a family member or child.
- **What impact does the EPSLA have on employers' current PTO policy?** Emergency paid sick leave must be provided *in addition to* any sick leave already provided by the employer. The employer *may not* require that an eligible employee use other paid leave provided by the employer before the employee uses emergency paid sick leave.
- **Will emergency paid sick leave roll over to the next calendar year? Must employers pay for unused sick leave under the EPSLA on termination of employment?** The EPSLA expires on December 31, 2020. The EPSLA provides that emergency paid sick leave does not carry over from one year to the next and is not required to be paid out upon termination of employment.
- **May an employer require that an employee find a replacement employee to cover his or her hours of work?** Employers cannot, as a condition of providing the paid sick leave, require an employee to search for or find a replacement employee to cover the hours during which the employee is using emergency paid sick leave.
- **What other actions by employers are prohibited under the EPSLA?** It is unlawful under the EPSLA to discharge, discipline or otherwise discriminate against any employee who takes emergency paid sick leave under this law or who files any complaint or proceeding related to the EPSLA or who testifies or is about to testify in any proceeding that seeks to enforce this law.
- **Are employees on medical or other leave eligible for emergency paid sick leave?** The answer to this question is not addressed in the legislation, but a reasonable interpretation

would be that *only* employees who cannot work or telecommute for the reasons set out in the EPSLA would be eligible for the emergency paid sick leave; employees who are out for a different medical or other reason would not be eligible.

- **Are employees who are laid off or furloughed eligible for emergency paid sick leave?** Again, the answer to this question is not explicitly addressed in the EPSLA. Until we receive additional guidance from Congress, the Department of Labor (“DOL”) or the courts, it is a reasonable interpretation that employees who are not working due to a lack of work would not be eligible for the emergency paid sick leave.
- **What are the penalties for violation of the EPSLA?** An employer who fails to provide emergency paid sick leave to an eligible employee will be considered to have failed to pay minimum wage and will be subject to the penalties set out in the Fair Labor Standards Act (“FLSA”). An employer who violates the no discrimination or no retaliation provisions of the EPSLA will likewise be deemed to have violated the no discrimination, no retaliation provisions of the FLSA, and will also be subject to FLSA penalties. These penalties include the payment of double damages, interest and attorneys’ fees. There are also potential criminal penalties and individual managers can be found liable for non-compliance under certain circumstances.
- **Is there any exemption from the paid sick leave requirements for small employers?** Small Employers are not automatically exempted. The U.S. Secretary of Labor has the authority under the EPSLA to exempt employers with fewer than 50 employees from providing emergency paid leave for employees caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, *if* the imposition of the required leave would jeopardize the viability of the business as a going concern. There is no such possible exemption for small employers related to the other provisions of the EPSLA. The DOL has not yet issued rules defining the standards applicable to this exemption, but the DOL’s preliminary guidance states that it will be based on “simple and clear criteria” that will be provided within 30 days.
- **What notices must be provided to employees under the EPSLA?** Employers are required to post and keep posted in conspicuous places in their workplace where labor notices are customarily posted, a notice about the EPSLA prepared or approved by the U.S. Secretary of Labor. The Secretary of Labor is to make such a notice publicly available with seven days after enactment of the EPSLA, so we expect a form of notice will be

publicly available on or before March 25, 2020.

- **May employers require employees who wish to take emergency paid sick leave give notice of the need for leave or require a note from the employee's doctor?** After the first day or portion of a day that the employee receives paid sick leave under the EPSLA, an employer may require an employee to follow reasonable notice procedures in order for the employee to continue to receive paid sick leave. Presumably, these procedures can include the employer's existing written policies regarding call in and notice applicable to other types of medical leave. The EPSLA does not specifically address whether employers may require a doctor's note; however, given the possible shortage of doctors and medical facilities available, the requirement of a doctor's note may not be seen as a reasonable condition for the continuation of paid sick leave under the EPSLA.
- **What recourse do employers have when learning that an employee is abusing the right to emergency paid sick leave?** As in any other employment situation, if an employer receives credible evidence that an employee is falsifying information in order to obtain a benefit to which he or she is not otherwise legally entitled, the employer may take corrective action, up to and including termination of employment. Employers should proceed cautiously, however, in order to avoid liability for discrimination or retaliation under the EPSLA.

Emergency Family and Medical Leave Expansion Act

- **What is the Emergency Family and Medical Leave Expansion Act ("EFMLEA")?** The EFMLEA is a law contained within the FFCRA that expands the existing Federal Family and Medical Leave Act ("FMLA"). It not only provides for job-protected leave for qualifying reasons related to COVID-19, but it also expands FMLA coverage to small businesses and new hires who ordinarily would not be eligible for FMLA leave.
- **Because the FMLA only applies to employers with 50 or more employees, are employers with less than 50 employees exempt from the EFMLEA?** *The normal FMLA employer coverage requirements do not apply. Any employer with fewer than 500 employees is covered, even those with fewer than the current FMLA threshold of 50 employees. The DOL can exempt employers with fewer than 50 employees if complying with the law would threaten the viability of the business (but it is unclear at present how this exemption would be granted or how lenient the DOL will be).*

- **How long do employees have to work for an employer to be eligible for leave under the EFMLEA?** The normal rule under FMLA is that an employee must have worked with the employer for at least 12 months, and have worked a minimum of 1,250 hours of service in the last 12 months. However, employees who need leave to care for a minor child because of closed schools or childcare providers due to COVID-19 only need to have been employed for 30 calendar days. No minimum hours of service are required.
- **What is a qualifying reason to take leave?** An employee can use leave under the EFMLEA if the employee is unable to work (including telework) due to need to care for a son or daughter under 18 years old whose school or place of care has been closed, or where the regular child care provider of such child is unavailable, due to an emergency with respect to COVID-19 declared by a Federal, State, or local authority. This leave is referred to as public health emergency leave.
- **How long is the leave available for eligible employees?** Up to 12 weeks.
- **Are employers required to pay employees for this leave?** The first 10 days do not need to be paid. The employee chooses whether to use other paid leave (including emergency sick leave, accrued vacation or personal leave) or take unpaid leave. The following 10 weeks must be paid at two-thirds of the employee's rate of pay. Paid leave is capped at \$200 per day and \$10,000 in total.
- **How much notice must employees give employers when they need to take leave?** Employees only have to provide such notice of leave as is practicable under the circumstances if the leave is foreseeable.
- **Must an employer offer an employee using such leave his or her job back at the end of the leave?** This leave is job-protected, meaning the employer must restore an employee to the same or equivalent position upon the employee's return to work. An exception to this requirement exists for employers with fewer than 25 employees, if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic). However, there are additional requirements for a small business to satisfy this exception, including an attempt to return the employee to work if a position becomes available in the future.

- **What if an employee needs more than 12 weeks of leave?**

Leave beyond twelve weeks for this purpose would not be job protected under the EFMLEA; however, there may be other laws that apply and that provide for additional leave.

- **Are there any exceptions?** Certain health care workers and emergency responders may be excluded from coverage by the Department of Labor. Employers with 500 or more employees also are not subject to this law. Finally, the Department of Labor may also exempt small businesses with fewer than 50 employees when imposing the requirements would jeopardize the viability of the business as a going concern.

Tax Relief for Employers Under The FFCRA

- **Is there any financial assistance for employers to pay for emergency paid sick leave and public health emergency leave?**

The FFCRA provides refundable tax credits for employers providing paid emergency sick leave or paid public health emergency leave.

For an employee who is unable to work because of COVID-19 quarantine or self-quarantine, or who has COVID-19 symptoms and is seeking a medical diagnosis, covered employers may receive a refundable tax credit for sick leave pay at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a maximum of 10 days. For an employee who is caring for someone with COVID-19, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to COVID-19, covered employers may claim a credit for sick leave pay for two-thirds of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for a maximum of 10 days. In addition to the sick leave credit, for an employee who is unable to work because of a need to care for a child whose school or child-care facility is closed or whose childcare provider is unavailable due to COVID-19, eligible employers may receive a refundable childcare leave credit. This credit is equal to two-thirds of the employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate. Up to 10 weeks of qualifying leave can be counted towards the childcare leave credit. Covered employers are entitled to an additional tax credit determined based on costs incurred by the employer to maintain health insurance coverage for the eligible employee during the leave period.

- **How does the FFCRA's tax credit work?** Ordinarily, employers are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. Employers deposit federal

taxes, along with the employer's share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941) with the IRS.

Under guidance that will be released soon, eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. If there are not sufficient payroll taxes to cover the cost of qualified sick and childcare leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.

- **Can you give us an example?** If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes (including taxes withheld from all its employees), the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date. If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments, and file a request for an accelerated credit for the remaining \$2,000.
- **What about small businesses? Is any other relief available?** Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or childcare unavailability where the requirements would jeopardize the ability of the business to continue. The DOL plans to issue emergency guidance and rulemaking to more clearly articulate this standard.

COVID-19 Employee Benefits Administration Issues

- **If an employer's employees are out of work on a leave of absence, are they still entitled to coverage under the group health plan?** It depends on the type of leave and terms of an employer's group health plan document and health insurance policy (or stop-loss policy for self-funded health plans). Under FMLA (and similar state laws), employers are required to maintain group health coverage for employees (whether the

leave is paid or unpaid) in the same manner as if they were still actively employed.

Once FMLA leave expires, employees can either continue unpaid leave in accordance with employer policies and may also be able to continue health coverage for a period of time (provided the insurance policy and welfare benefits plan document allows employees who are not actively at work to remain covered). At the end of this period, active employee coverage must be terminated, which is a COBRA qualifying event that could allow the employee to continue insurance coverage under COBRA.

- **In an employee is furloughed, is the employee still eligible for coverage under the employer's group health plan?** It depends. Similar to a non-FMLA leave, the terms of the health insurance policy or welfare benefits plan document will determine whether employees who are not "actively at work" can continue active coverage. Employers that sponsor self-insured health plans may have more flexibility because they can amend their plans to waive eligibility conditions and allow furloughed employees to continue active coverage. However, before doing this, self-insured health plan sponsors should obtain the consent of their reinsurance carriers to avoid any coverage issues.

Blue Cross NC and United Healthcare have announced that they will provide health plan coverage for covered employees and dependents as long as (i) employers consider them to be active employees during periods of temporary layoffs and/or reduction in hours and (ii) the premiums are paid in a timely manner. Other insurers will probably adopt a similar approach, but an employer should check with its own insurer. Blue Cross NC has indicated that it will review the policy on April 30th and other insurers will probably do the same.

- **Is COVID-19 testing covered by an employer's group health plan?** The FFCRA requires fully insured and self-insured group health plans (other than retiree-only plans) to provide coverage for FDA-approved COVID-19 diagnostic testing products and related items and services an employee receives during a visit with his or her health care provider. Covered services include diagnostic testing, health care provider services (in-person and telehealth), and facility costs (physician office, urgent care center and emergency room) to the extent the costs are related to evaluating or testing for COVID-19.

Further, to facilitate COVID-19 efforts, the IRS issued Notice 2020-15 which: (1) clarified that vaccines are considered "preventive care" under Code Section 223 for purposes of HDHP qualification and deductibility of HSA contributions; and (2)

provided that, until further notice, medical services and items purchased for testing for or treatment of COVID-19, may be provided by a HDHP, without disqualifying the HDHP or covered individual from making HSA contributions.

- **If employees are furloughed without pay or are placed in an unpaid leave of absence and group health coverage is continued, how should premiums be paid?** There are a few options. The employer can: 1) elect to reduce or waive the employee portion altogether so that the employer pays 100% of the premiums; 2) arrange to have employees pay the employee portion by check or other means outside of payroll using after tax dollars; 3) allow employees to make up the employee portion after the leave or furlough has concluded and the employee returns to active work; or 4) require employees to enter into payroll reduction agreements in advance to recover premium payments made by the employer on their behalf during the leave through payroll deductions when the employees return to work.
- **Is there any relief available to employees who have vested account balances in an employer's 401(k) plan or other tax-qualified defined contribution retirement plan (i.e., hardship distributions)?** It depends on whether the employer's retirement plan allows hardship distributions and, if so, the standard that the retirement plan uses to determine whether an employee is eligible for a hardship distribution. If the plan uses the traditional "safe harbor" definition for determining whether an employee qualifies for a hardship distribution, then it is unlikely that a period of prolonged unpaid leave will constitute a covered hardship. If the retirement plan uses a facts and circumstances determination, it is possible that a hardship brought on by COVID-19 could qualify as a covered hardship.

Unemployment Benefits Related to the COVID-19 Crisis

- **Does the FFCRA provide unemployment assistance to employees who have been terminated or experienced reduced hours related to the current COVID-19 crisis?** The FFCRA does not provide unemployment assistance. Many states, however, have provided measures to assist employees under these circumstances.
- **What has North Carolina done to provide unemployment assistance?** North Carolina Governor Roy Cooper issued Executive Order 118 (the "Order") on March 17, 2020. This order addresses, among other things, unemployment benefits

for those who are out of work due to the pandemic.

- **What does the Order require?** The Order requires that the Department of Commerce, through the Division of Employment Security, “interpret flexibly or waive” several provisions of the North Carolina Employment Security Law, including the one-week waiting period, the requirement that the worker be available or able to work, and the work search requirements. Under the Order, employees whose hours have been reduced, those who cannot work from home due to illness with COVID-19, and those who are required to stay home due to disease control measures will be considered eligible for unemployment benefits.

The [Employment Practice Group](#) at Wyrick Robbins Yates & Ponton LLP is closely monitoring the FFCRA, the EPSLA, and the EFMLEA. It is regularly assisting clients about these issues, as well as all other employment issues related to the current COVID-19 crisis. If you have any questions about this alert or any related COVID-19 planning issues, please feel free to reach out to any of the members of the practice group.