

CLIENT ALERT: The Families First Coronavirus Response Act

On March 18, 2020, the United States Senate approved, and President Trump signed into law, a revised version of a novel coronavirus relief measure, H.R. 6201, passed by the House of Representatives on March 14, 2020. The following is an overview of what employers can expect from the new law, The Families First Coronavirus Response Act (“FFCRA”). The law provides (1) expanded FMLA eligibility (with pay), (2) expanded required paid sick days, and (3) expanded unemployment benefits.

1. **Emergency Family and Medical Leave Expansion Act.** The FFCRA expands the Family and Medical Leave Act of 1993 (“FMLA”) for public health emergencies related to novel coronavirus (COVID-19). The Federal government will reimburse eligible employers for this leave through a direct tax credit. Specifically, this new expansion:

- Applies to employers with fewer than 500 employees (altering the FMLA’s usual requirement that it applies to employers with 50 or more employees) and covered public- sector employers;
- Makes employees eligible after 30 days of employment (relaxing the FMLA’s usual requirement that an employee be employed at least 12 months with at least 1250 hours of service); and
- Permits eligible employees to take up to 12 weeks of job-protected leave under the FMLA when the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to the current public health emergency

The first 10 days of leave under the Emergency Family and Medical Leave Expansion Act may be unpaid, but employees may elect, in accordance with the provisions of the FMLA, to use accrued vacation, personal, medical, or sick leave. Employees will also potentially be eligible for Emergency Paid Sick Leave for this period, as set forth below. After the first 10 days, the employee must be paid a benefit in the amount of not less than 2/3 of an employee’s regular rate of pay, multiplied by the number of hours the employee would otherwise be normally scheduled to work.

The paid leave benefit is capped at \$200 per day per employee, and \$10,000 in the aggregate per employee. Employees using leave must provide as much notice to their employers as practicable if the leave is foreseeable.

For employers with fewer than 25 employees, FMLA job restoration requirements will not apply if:

- An employee takes Emergency Family and Medical Leave, as described above;
- The position the employee held when leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer

1) that affect employment, and

2) that are caused by a public health emergency during the period of leave;

- The employer makes reasonable efforts to restore the employee to an equivalent position; and
- If the reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available within 1 year of when the public health emergency concludes or the end of the employee's 12-week leave period, whichever is earlier.

The Secretary of Labor has the authority to issue regulations to exempt employers with fewer than 50 employees from providing the Emergency Family and Medical Leave when the imposition of the requirements would jeopardize the viability of the business as a going concern.

The Secretary of Labor may also issue regulations excluding certain health care providers and emergency responders from being "eligible" employees under the Emergency Family and Medical Leave Expansion Act. Additionally, employers of health care providers or emergency responders are permitted to exclude them from the Act's provisions.

Employers (including the self-employed) paying benefits under the Emergency Family and Medical Leave Expansion Act will be eligible for a refundable tax credit equal to 100% of qualified family leave paid by the employer for each calendar quarter. The tax credit is capped at \$200 per day per employee, or \$10,000 in the aggregate per employee. The credit does not apply to public-sector employers.

2. **Emergency Paid Sick Leave Act.** The FFCRA also establishes emergency paid sick leave for employees of private entities or individuals that employ fewer than 500 employees and employees of covered public-sector employers. Like the Emergency FMLEA above, the Federal government will reimburse eligible employers for this leave through a direct tax credit. The Emergency Paid Sick Leave Act provides that employers must provide paid sick time to the extent an employee is 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.

If the leave is for any of the above purposes, the payment for leave must be the greater of the employee's regular rate of pay or the highest applicable minimum wage (local, state or federal). For these purposes, paid sick time is capped at \$511 per day per employee and \$5,110 in the aggregate per employee.

Besides the employee's own COVID-19 condition, employers must also provide paid sick time to the extent an employee is unable to work (or telework) because:

- The employee is caring for an individual who is subject to a quarantine or isolation order or health care provider advisory, as described above.

- The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter 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 Secretary of the Treasury and the Secretary of Labor;

If the leave is for any of these reasons, the leave must be the greater of 2/3 of the employee's regular rate of pay, or 2/3 of the highest applicable minimum wage (local, state or federal). For these purposes, paid sick time is capped at \$200 per day per employee and \$2,000 in the aggregate per employee.

For full-time employees, employers must provide 80 hours of paid sick time. For part-time employees, employers must provide the average number of hours the employee typically works over a two-week period.

Other provisions of the Emergency Paid Sick Leave Act include:

- Employers of health care providers and/or emergency responders may elect to exclude such employees from application of the Emergency Paid Sick Leave Act.
- Sick time cannot be carried over from one year to the next;
- Employers may not require, as a condition of use of emergency paid sick time, that employees find a replacement to cover hours missed;
- Employers may not require employees to use other paid leave prior to using emergency paid sick time;
- After the first workday (or portion of a workday) an employee receives paid sick time, the employee may be required to follow reasonable notice procedures in order to continue receiving paid sick time;
- Employers must post notice of employee's eligibility for emergency sick time (with the form of notice forthcoming);
- Employers are not required to reimburse an employee for unused emergency sick time upon termination, resignation, retirement, or other separation from employment; and
- It is unlawful to discharge, discipline, or discriminate against an employee who takes leave or files a complaint under the Emergency Paid Sick Leave Act.

As with the Emergency Family and Medical Leave Expansion Act, the Secretary of Labor has the authority to issue regulations to exempt small businesses with fewer than 50 employees from the requirements of the Emergency Paid Sick Leave Act when the imposition of such requirements would jeopardize the viability of the business as a going concern. The Secretary of Labor may also issue regulations excluding certain health care providers and emergency responders.

Employers (including the self-employed) paying benefits under the Emergency Paid Sick Leave Act will be eligible for a refundable tax credit equal to 100% of qualified emergency sick leave paid by the employer for each calendar quarter. The tax credit is capped at \$511 per day per employee (for leave related to employee's own quarantine, or employee's own diagnosis/treatment), or \$200 per

day per employee (for caring for another person quarantined or diagnosed, see bullet points above for specific reasons). The credit does not apply to covered public-sector employers.

Both the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act take effect no later than 15 days after the bill's enactment, and expire on December 31, 2020.

- 3. *Emergency Unemployment Insurance Stabilization and Access Act of 2020.*** The FFCRA also creates additional emergency funding for unemployment benefits. States in which the number of unemployment compensation claims has increased by at least 10% over the same quarter in the prior calendar year will be eligible for such emergency funds, provided that they adhere to certain requirements. It is our expectation that most every state should meet this threshold. The requirements for states to receive the additional funds include (1) mandating that employers notify employees of available unemployment compensation, (2) ensuring that applications are accessible at in at least two forms (i.e., in-person, by phone, or online), (3) notifying applicants when an application has been received and is being processed, and (4) easing eligibility requirements. These eased eligibility requirements include that states waive work search requirements and the one week waiting period for unemployment benefits. The Act also requires a relief from charges for employers directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers.

Please note that the above is an overview of some of the FFCRA's employment provisions, which may be further altered or modified by future legislation or government regulation. Employers with questions about FFCRA, FMLA, other employee illness, or disability and/or medical leave laws should consult with their MBJ attorney.

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