

Coronavirus (COVID-19) Update

March 23, 2020

The Coronavirus (COVID-19) is impacting businesses of all sizes, industries and locales. Our goal is to provide you with currently available information regarding COVID-19's impact on leave of absence programs, but please know that this information is subject to change as the situation continues to evolve.

This update provides a summary of Families First Coronavirus Response Act (FFCRA). The information below is as of March 20, 2020. The Department of Labor (DOL) is actively developing guidance that employers may use to administer FFCRA. We expect this guidance to become available in April 2020. Furthermore, we expect to receive additional guidance from the Internal Revenue Service (IRS) on the tax credits related to FFCRA; we provide brief information about the tax credits within this memo.

Families First Coronavirus Response Act (HR 6201) – Emergency Expansion of FMLA and Paid Sick Leave

Since its original iteration, Families First Coronavirus Response Act has undergone changes that have been approved by the Senate and signed by President Trump. FFCRA will become effective on April 2, 2020 and is scheduled to sunset on December 31, 2020.

With respect to leave of absence, FFCRA has established two programs: (1) Emergency FMLA; and (2) Emergency Paid Sick Leave. A summary of each is provided below. At the end of the memo, we have developed a flowchart visual to help illustrate these rules.

Emergency FMLA (E-FMLA) – Summary

Unlike other portions of the Family and Medical Leave Act (FMLA), E-FMLA applies to employers with less than 500 employees. This means that employers with 500 or more employees do not have to provide E-FMLA required under the FFCRA. Furthermore, unlike the other provisions of the FMLA, E-FMLA applies to employees who have worked at least 30 calendar days (instead of 12-months and 1,250 hours which still apply to all of the other FMLA provisions).

E-FMLA is available for only one reason: for employees who are unable to work or telework because he/she needs to care for his/her child because the child's school or childcare facility is

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closed due to public health emergency.

Like its counterparts in the FMLA, E-FMLA provides employees with up to 12 weeks of leave. However, while FMLA is an unpaid leave entitlement, E-FMLA provides some wage replacement benefits. The first ten (10) days of the 12 weeks is unpaid. During the unpaid ten (10) days, the employee may use any available paid time off they already have access to or may use Emergency Paid Sick Leave (see *Emergency Paid Sick Leave section below*). The remaining 10 weeks of the 12 weeks is paid at two-thirds the employee's regular rate of pay up to \$200 per day, or \$10,000 in aggregate.

E-FMLA provides job protection and, therefore, job restoration rights in alignment with traditional FMLA rights and obligations. However, the job restoration rights apply to employers with more than 25 employees; employers with less than 25 employees are generally excluded from this requirement if the position no longer exists following E-FMLA due to economic downturn or other circumstances.

Emergency Paid Sick Leave (E-PSL) – Summary

Like E-FMLA, E-PSL applies to employers with less than 500 employees. Unlike E-FMLA, however, all employees are eligible for E-PSL, which means employees do not have to satisfy any minimum service requirements.

E-PSL provides up to 80 hours of paid sick leave and is prorated for part time employees.

Paid sick leave is available to employees who are unable to work or telework because:

1. the employee is quarantined or isolated by Federal, State or local order;
2. the employee is advised to self-quarantine by order of a health care professional;
3. the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. the employee is caring for an individual subject to quarantine or isolation by Federal, State or local order or by order of a health care professional (akin to #1 and #2 above);
5. the employee is caring for a child because the child's school or childcare facility is closed; 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 Treasury and Secretary of Labor.

Interestingly, FFCRA significantly expanded reason #4 beyond the limitations set forth in FMLA for "immediate family member" by allowing an employee to take leave to care for an "individual," which seems to extend to non-familial relationships.

Furthermore, reason #6 creates a "catch all" clause so that the list of qualifying reasons could expand as COVID-19 continues to evolve.

The amount of wage replacement benefits varies based on the reason for the employee's leave. More specifically, employees seeking Emergency Paid Sick Leave for reasons #1-#3 will be paid at 100% their regular rate of pay, which may be capped at \$511 per day, or \$5,110 in aggregate. By contrast, employees seeking Emergency Paid Sick Leave for reasons #4-#6 above will be paid at two-thirds their regular rate of pay, which may be capped at \$200 per day, or \$2,000 in aggregate.

E-PSL clarifies how to calculate an employee's "rate of pay":

- Full time employees: regular rate of pay based on hours normally scheduled to work.
- Part time and variable hour employees: rate of pay based on average number of hours the employee worked for six (6) months prior to taking leave.
- Employees with less than six (6) months of service: rate of pay based on average number of hours the employee would normally be scheduled to work over a two-week period.

It is important to note that Emergency Paid Sick Leave is provided in addition to any other employer-provided paid time off. An employer may not require an employee to use other paid time off before E-PSL. Instead, the employee may choose the order of how time is used. For example, an employee may choose to first use his or her employer-provided PTO and then use E-PSL. Likewise, E-PSL does not preempt any local paid sick leave requirements that already exist.

Employees may not carry an unused E-PSL balance to the next calendar year and the employee is not entitled to a payout of E-PSL upon termination of employment. While E-PSL may cause some staffing challenges for employer, employees cannot be required to find a replacement if he/she cannot work or telework for a qualifying E-PSL. It remains the employer's responsibility to identify staff to fill-in for the employee on E-PSL. Employers likewise may not retaliate against an employee for using his or her E-PSL.

An illustrative flowchart of E-FMLA and E-PSL is provided at the end of this document.

Other Notable E-FMLA and E-PSL Provisions

- The Secretary of Labor may exempt small businesses with fewer than 50 employees if imposition of FFCRA's requirements would jeopardize the viability of the business.
- Because the FFCRA is a modification to the existing FMLA, the current FMLA rules regarding employer headcount will apply to this provision of the law. More specifically, employers should turn to the Integrated Employer Test to determine whether separate employing entities should be aggregated for headcount purposes (29 C.F.R. § 825.104):

Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is 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:

- (i) Common management;
- (ii) Interrelation between operations;
- (iii) Centralized control of labor relations; and

- (iv) Degree of common ownership/financial control.
- In an effort to avoid misuse of these new provisions, many clients have asked about required or supporting documentation. At this time, FFCRA has not clarified what type of documentation/certification an employer may request. However, in light of the overwhelming demand on healthcare providers, both the Centers for Disease Control (CDC) and the Department of Labor (DOL) have recommended that employers consider suspending any certification requirements.
- FFCRA does allow employers of employees who are health care professionals and emergency responders to exclude such employees from FFCRA. However, FFCRA has not exactly defined what constitutes “health care professionals.”

Tax Credits for E-FMLA and E-PSL

Recognizing that this is a sudden, unexpected cost to employers, Congress provided in the FFCRA tax credit mechanisms to shoulder the cost of E-FMLA and E-PSL, mainly by reducing the employer’s payroll tax remittances to the government. Please note that governmental employers are not eligible for the tax credits under the FFCRA.

Specifically, employers may reduce the amounts of employee income, Social Security and Medicare tax payments to the IRS by the amount of E-FMLA and E-PSL paid leave provided to employees. To take immediate advantage of the paid leave credits, businesses may retain and access the funds that they would otherwise pay to the IRS in payroll taxes. If these funds are insufficient to cover the cost of E-FMLA and E-PSL, then employers may seek an expedited advance from the IRS by submitting a streamlined claim form. However, this claim form has not yet been released. Furthermore, as it stands, tax credits issued by the government will not be available to any E-FMLA and/or E-PSL payments made by the employer to employees before the FFCRA effective date, April 2, 2020.

Finally, employers may only reduce their payroll tax remittances up to the E-FMLA and E-PSL capitated amounts noted earlier in this memo: (1) E-FMLA: up to \$200/day or \$10,000 in aggregate; (2) E-PSL: up to \$511/day or \$5,110 in aggregate or \$200/day or \$2,000 in aggregate, depending on E-PSL reason.

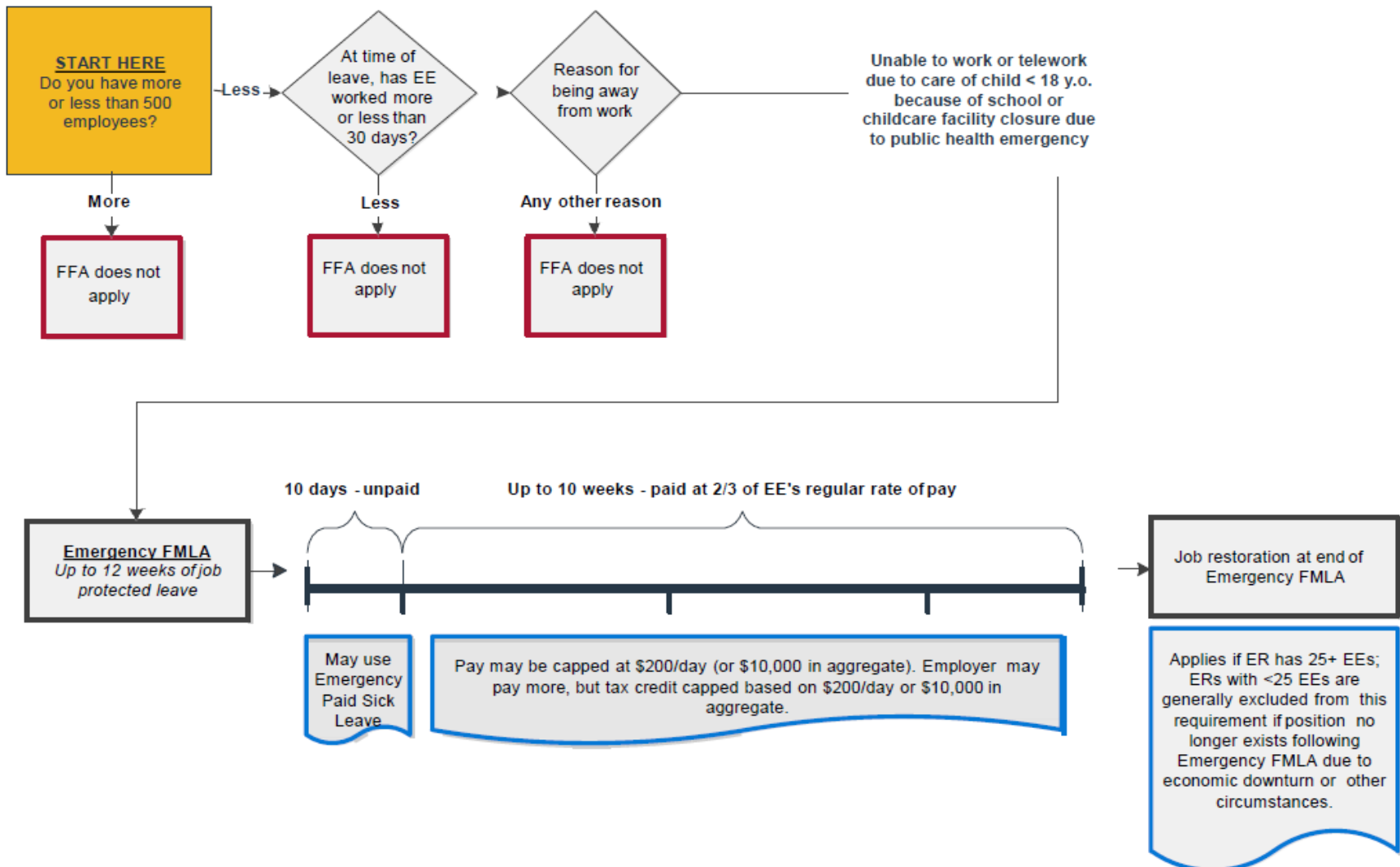
Please note that these steps are described generally in an IRS announcement issued on March 20, 2020. The official guidance from the IRS is forthcoming.

What happens now?

The DOL has been tasked with drafting the actual regulations that will govern the FFCRA along with any supporting forms and/or notices. We expect to see the DOL regulations in April 2020. We are hopeful that the DOL’s regulations will answer many of the open questions created by the FFCRA legislation. Regarding the tax credits, employers subject to FFCRA should work with their payroll vendors and tax advisors to ensure they take full advantage of the tax credits. Additional updates and information on the tax credits are available on the IRS’ Coronavirus Tax Relief website: <https://www.irs.gov/coronavirus>. Please stay tuned to hubinternational.com and our Client Bulletin emails for updates as they happen and reach out to your account manager with any questions.

**Families First Coronavirus Response Act (FFA)
Effective April 2, 2020 – December 31, 2020**

Emergency FMLA



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Emergency Paid Sick Leave

