



## EMPLOYER COVID-19 LEGISLATIVE DEVELOPMENTS: FCCRA NOTICE, FAQs, AND THE CARES ACT

March 31, 2020

Over the past week, the United States Department of Labor (DOL) has continued to provide information necessary for employers to implement the Families First Coronavirus Response Act (FFCRA), including a model notice that must be in place by April 1, 2020: [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Federal.pdf), guidance in the form of additional FAQs on federal paid sick leave and expanded Family and Medical Leave Act (FMLA) obligations, and a “Field Assistance Bulletin,” No. 2020-1, confirming the temporary non-enforcement period applicable to the FFCRA will be March 18 through April 17, 2020. In addition, President Trump signed the omnibus Coronavirus Aid, Relief, and Economic Security Act (CARES Act) into law on March 27, 2020, making available unprecedented cash and unemployment relief to individuals and loans and tax benefits to a wide range of businesses. Key takeaways and action items for employers are described below.

### FFCRA REQUIREMENTS CLARIFIED

#### Notice Requirements

Each covered employer must post notice of the FFCRA requirements “in a conspicuous place on its premises,” which includes emailing or mailing the notice to employees or posting the notice on an employee information internal or external website. The notice only must be provided to current active employees, not to laid-off or furloughed individuals. Where an employer’s workforce perform work in several different locations, the employer must post all required federal notices in each building, even if the buildings are in the same general vicinity (e.g., in an industrial park or on a campus). Required notices cannot all be kept in a binder and instead must be displayed (in print or electronically) where they are easily visible to employees. Current notice requirements can be found at <http://www.dol.gov/agencies/whd>.

#### Frequently Asked Questions – FFCRA Paid Sick Leave and Expanded FMLA Leave

##### Covered Employees and Employers

Providing much needed clarification, the DOL FAQs (number 56) explain that the “healthcare providers” who may be exempted from paid sick leave and expanded FMLA by their employer include anyone employed at any doctor’s office, hospital, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health provider, any facility that performs laboratory or medical testing, pharmacy, or any “similar” institution, employer or entity. This broad definition also

includes any individual employed by an entity that contracts with any of the above covered employers to provide services or to maintain the operation of the facility. While defining this exemption as broadly as possible, the DOL encourages employers to be judicious when using the definition to exempt healthcare providers from the provisions of the FFCRA.

In FAQ number 58, the DOL furnishes additional parameters for the small business exemption from the paid sick leave and expanded FMLA leave requirements. Specifically, an employer with fewer than 50 employees is exempt from providing paid sick leave due to school, daycare or childcare closures or expanded FMLA when doing so will jeopardize the viability of the small business. To claim this exemption, an authorized officer of the business must determine that providing the paid leave will exceed available business revenues and cause the small business to cease operating at a minimal capacity; the absence of the employees requesting paid leave would entail a substantial risk to the financial health or operational capacities of the small business because of their specialized skills, knowledge of the business or responsibilities; or there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services provided by the employees requesting leave and these services are needed for the small business to operate at minimal capacity.

#### Leave Process and Amount of Leave

Although neither model forms nor regulations have been issued by the DOL, the March 26, 2020, second set of FAQs outlines the process for requesting and documenting paid sick leave or expanded FMLA leave provided pursuant to the FFCRA. Specifically, employees should be required to submit the reason for paid leave, the anticipated duration of leave, and supporting documentation including either a copy of a quarantine or isolation order, written documentation from a healthcare provider advising the employee to self-quarantine, medical provider confirmation that an employee has symptoms of COVID-19 and is seeking a medical diagnosis, confirmation that an employee is caring for an individual who has been quarantined or recommended to self-quarantine by a healthcare provider, or evidence that the school, daycare, or childcare provider of an employee's son or daughter is closed due to COVID-19 related reasons. The DOL guidance indicates that a notice posted on a government, school, or daycare website, newspaper notice, or an email from the childcare provider, daycare, or school confirming the period of the closing is sufficient. While this documentation may seem unnecessarily burdensome at first blush, an employer who wishes to obtain tax credits for providing paid sick or expanded FMLA leave under the FFCRA will need substantiation to comply with Internal Revenue Service requirements. Leave is not required to be provided if materials sufficient to support the employer tax credit are not provided by the employer, but employer policies that impose objectively unreasonable requirements also may be challenged as effort to interfere with or retaliate against employees seeking leave.

The FAQs also confirm that the total expanded FMLA leave available to an employee is capped at 12 weeks. This 12-week maximum is reduced by any FMLA leave taken by the employee for other reasons during the applicable 12 month period determined by the employer (often a 12-month period rolling backwards). The maximum period of federal paid sick leave is not reduced regardless of how much prior leave the employee has taken under the FMLA.

Finally, for purposes of federal paid sick leave, a full-time employee is an employee who is normally scheduled to work 40 hours or more per week. As many employers designate as "full-time" employees who work between 35 and 39 hours

per week, these employees will be treated as “part-time” for paid sick leave purposes and they will not be entitled to the maximum 80 hours of paid sick leave.

### Telework

Paid leave is available when an employee is unable to work or telework. The FAQs explain that when an employer allows an employee to perform tasks or work a certain number of hours from home or another location other than the regular workplace, this is equivalent to regular working time and leave is not available unless a COVID-19 qualifying reason prevents the employee from working the requested schedule. Employers may, but are not required to, allow employees to take paid sick leave or expanded FMLA intermittently while teleworking. The increments for any intermittent leave permitted will be established by employer policy. In contrast, paid sick leave for reasons related to COVID-19 must be taken in full-day increments. Once paid sick leave begins, an employee must continue to utilize this leave until it is exhausted or no qualifying reason for taking the paid leave continues to exist. If the full amount of paid leave is not used and another qualifying reason occurs, an employee may take any remaining paid sick leave at a later time until December 31, 2020.

### Impact of Furloughs and Layoffs

Any employees who are furloughed or laid off due to a lack of work or because of a federal, state or local directive to close the business, are not entitled to paid sick leave or expanded FMLA leave (other than leave used on or after April 1, 2020, and before the furlough or layoff). Paid sick leave or expanded FMLA leave also is not available to employees whose work hours are reduced because an employer does not have work for the employee to perform.

### Additional Benefits Paid

Employers may pay employees more than the FFCRA required amount of paid sick leave or paid expanded FMLA leave. However, an employer cannot claim, and will not receive tax credits for, amounts paid in excess of the FFCRA’s statutory limits.

### The CARES Act

A comprehensive overview of the CARES Act is found in a companion client advisory issued by Hancock Daniel today. The covered topics which may especially interest employers and their employees the most include the following:

- “Recovery rebates” or rebates of up to \$1,200 for individuals (\$2,400 for joint filers) are provided, plus \$500 per child, with the payments reportedly to be made in approximately three weeks by direct deposit or check. Certain employees will not be eligible for any rebates, including individual taxpayers with an adjusted gross income exceeding \$99,000, \$198,000 for joint filers, and \$146,500 for heads of household. The employee’s 2019 tax return will be used to determine eligibility (if already filed), or the 2018 tax return may be used in the alternative.
- The FFCRA definition of employees who are eligible for expanded FMLA leave is modified to include an employee who: a) was laid off by the employer on or after March 1, 2020; b) was employed by the employer for at least 30 of the 60 days prior to the employment separation, and c) is rehired by the employer on or after April 1, 2020. The total

cap for paid sick leave is \$200 per day and \$10,000 per employee, as had been widely interpreted and the paid FMLA caps also are per employee.

- Expanded unemployment insurance is available through a “Pandemic Unemployment Assistance” program that will end on December 31, 2020. For weeks of full unemployment, partial unemployment, or inability to work caused by COVID-19 between January 27 and December 31, 2020, covered individuals will be eligible for unemployment at the amount provided by state law plus an additional \$600 until July 31, 2020. The maximum unemployment benefit period is increased to 39 weeks instead of the 26 week period utilized in Virginia and many other states.
- The CARES Act enhances the benefit of the paid sick leave and expanded FMLA leave through tax credits, allowing employers to receive an advance tax credit from the United States Treasury rather than waiting to be reimbursed or to offset against quarterly tax payments when they are submitted.
- The CARES Act waives a ten percent (10%) penalty for early distributions from retirement plans and IRAs related to the coronavirus not to exceed \$100,000 for individuals who have been diagnosed with COVID-19, their spouse or dependent who has been diagnosed with COVID-19, or for a person who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, or suffered reduced work hours, or who is unable to work due to a lack of childcare. Loans available from qualified plans also are increased from \$50,000 to \$100,000.
- Minimum funding contributions for qualified plans, including quarterly contributions, are delayed until January 1, 2021. However, the interest accruing for each period between the original due date and the revised payment date must be included in the minimum required contribution payment made.
- Potential employer educational assistance is expanded under the CARES Act, with employers able to exclude from an employee’s gross income amounts up to \$5,250 paid for student loan and related educational obligations between March 27 and December 31, 2020.
- Eligible employers may receive a temporary, refundable employee retention credit, delay certain employer payroll taxes and self-employment taxes, utilize a modified net operating loss rule that provides more immediate relief, and claim temporarily increased business interest deductions.
- Health savings accounts will be treated as qualified high deductible health plans even without a deductible for telehealth and similar remote health services. Employees with these accounts also have additional opportunities to use the funds for over-the-counter medical products, including those related to COVID-19 treatment or prevention.

Hancock Daniel’s [Labor and Employment team](#) is prepared to assist with any issues or questions related to the coronavirus and the Families First Coronavirus Response Act. Our [COVID-19 Taskforce](#) will advise and assist employers on all concerns arising from the pandemic.

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