

Understanding the Families First Coronavirus Response Act of 2020

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Agenda

- What is the intent of the FFCRA?
- Discussion of Emergency Paid Sick Leave Act
- Discussion of Family Medical Leave Expansion Act (FMLEA)
- How to calculate paid leave that is owed
- Some key considerations for trustees of multiemployer plans

Important Note

- A third federal stimulus package was passed and will be signed into law on March 27 or March 28
- It appears to have sections that may interact with the FFCRA, so keep in mind some of the content today may change as regulations and guidance is issued
- DoL has stated guidance is going to come on a rolling basis

What Does the FFCRA Do?

- Four things for purposes of our discussion:
 1. Provides for Paid Sick Leave
 2. Creates a narrow (but paid) expansion of FMLA leave
 3. Sets coverage requirements for health plans for COVID-19 related services
 4. Provides for tax credits to repay employers for the Paid Sick and FMLEA leave provided

Timeline for Implementation

- FFCRA takes effect on April 1, 2020, sunsets on December 31, 2020
- DoL has released a brief Q&A, full regulations not expected until April
- IRS is pushing ahead to allow offset of paid leave through payroll taxes (more on this later)

Part I: Emergency Paid Sick Leave

- In this Part we will discuss:
 1. What employers must provide it?
 2. The qualifying events for Paid Sick Leave
 3. How much does it pay and how long does it last?

What Employers Must Provide It?

- All employers with less than 500 employees
- Employers with less than 50 employees can seek an exemption if providing the leave would jeopardize the business
- No formal process yet on the hardship exemption, March 23 DoL Q&A says just to document it for now

What Employers Must Provide It?

- Per DoL March 23 Q&A, joint employers will have their employee counts aggregated
- Also employees on leave, temporary employees, and day laborers from any temporary agency will be counted toward the 50-employee threshold

What Employers Must Provide It?

- Wage and Hour Division giving a 30-day grace period in force until April 17 on enforcement
- No penalties for non-compliance if mistake was made in good faith, not willful and was reasonable
- Any leave owed must be paid as soon as possible, and employer will have to in writing agree to comply going forward

What Employees are Eligible to Take It?

- Unlike other benefits, there are no waiting periods for the new Paid Sick Leave
- In other words, the employee becomes eligible for the leave immediately
- The qualifying events for these employees are on the next slide

Qualifying Events for Paid Sick Leave

1. Employee is quarantined for COVID-19 per federal, state, or local order
2. Employee is advised to self-quarantine by a health care provider
3. Employee is experiencing symptoms of COVID-19 and needs to seek medical attention
4. Employee is caring for someone that meets the criteria of (1) or (2)
5. Employee is caring for son or daughter whose school is closed due to COVID-19 or whose childcare provider is not available due to COVID-19 precautions
6. Employee is experiencing symptoms of another condition as determined by HHS

How Much Does It Pay and How Long Does It Last?

- *Qualifying Events 1-3: Up to 80 hours/10 days of leave at the regular rate of pay, but capped at \$511 per day, up to a maximum of \$5,110 in the aggregate*
- *Qualifying Events 4-6: Up to 80 hours/10 days of leave at 2/3 of the regular pay rate, but capped at \$200 per day up to a maximum of \$2,000 in the aggregate*

How Does It Tie in with FMLEA?

- FFCRA creates a limited scope paid FMLEA leave (discussed in Part II)
- FMLEA is 12 weeks in duration, but the first 10 days may be unpaid at the employer's option
- Eligible employees can draw from Sick Leave (or other paid leave) to cover that 10-day period

How Does It Tie in with FMLEA?

- *Time:* An employee could be eligible for both, but in that instance the most paid leave available under the FFCRA is 12 weeks
- *\$\$\$:* The maximum dollar amount, if an employee is eligible for the full amounts of Paid Sick Leave and FMLEA, is \$12,000

Part II: Family Medical Leave Expansion

- In this Part we will discuss:
 1. What employers must provide it?
 2. Who is eligible to take it?
 3. How much does it pay and how long does it last?

What Employers Must Provide It?

- Employers with less than 500 employees
- Same rules to determine employee count apply for Paid Sick Leave (see prior slides)
- Same hardship exemption also applies for employers with 50 or fewer employees (see prior slides)

Who is Eligible to Take It?

- Unlike Paid Sick Leave, there is only one qualifying event. But it has three important components:
 1. Employees who have been employed for at least 30 days . . .
 2. Who cannot work or work remotely, and, with . . .
 3. A minor child whose school is closed and whose primary paid caregiver is not available due to the COVID-19 outbreak

Who is Eligible to Take It?

- Primary caregiver is generally considered to mean daycare or a paid person who is not a family member
- Expect a broad interpretation by DoL, in other words, employers won't be able to deny by telling an employee their spouse or a parent should stay home with the child

How Much Does It Pay and For How Long?

- Combines with Paid Sick Leave to give a maximum of 12 weeks
- Employee gets 2/3 of regular rate of pay, with a maximum of \$200 per day and no more than \$10k in total under FMLEA (\$12k total with Paid Sick Leave)
- The first 10 days can be without pay, but employee can substitute all other available forms of leave to make this period paid

Job Restoration Required?

- Like regular FMLA, the employee's job is protected under the regular FMLA rules
- *Exception:* For employers with 25 or fewer employees, there is a special rule discussed on the next slide

Job Restoration Required?

- The job does not need to be held open if:
 1. The position is eliminated due to economic circumstances or a public health emergency
 2. Employer makes reasonable efforts to restore the employee to the position on equivalent terms
 3. If these efforts fail and an equivalent position opens, the employer contacts the employee about the job within 1 year of the earlier of (a) date the leave ends or (b) the date 12 weeks after the leave starts

Part III: Calculating Leave Amounts and Rates of Pay

Now that we have the basics down, we will explore for both the Paid Sick Leave and the FMLEA how employers determine the number of paid hours an employee is eligible to receive, and the rate of pay for those hours.

How is the Rate of Pay Calculated?

- The rate of pay is the greater of:
 - The employee's regular hourly rate or salary
 - Federal minimum wage
 - State or local minimum wage

Does Overtime Count?

- Yes. Both the FMLEA and Paid Sick Leave Acts require the employee be paid for every hour he or she was scheduled to work (but capped at 80 hours for Paid Sick Leave)
- The premium for overtime hours does not apply. We will explore this in later slides with examples

Does Overtime Count?

- The DoL gave an example that if an employee is scheduled to work 50 hours one week and 30 the next, the employee would still get 80 hours of paid leave
- However, the increased rate of pay for the extra 10 hours in the first week would not apply

What About Fringe Benefit Contributions?

- Possibly, check your CBA. Hours paid for not working usually do not come with an obligation to make fringe benefit contributions
- Otherwise, affected bargained employees in multiemployer plans will have to rely on hour banks, self-payment/short hour payments, or other provisions of health plans that provide coverage due to disability

What About Employees with Irregular Schedules?

- Salaried full-time employees or those with regular schedules each week will be easy to calculate
- For hourly and part-time employees who do not work regular hours each week, the calculation is a little trickier and a look back period may be applied, or an estimate used

What About Employees with Irregular Schedules?

- For employees with at least a 6-month work history:
 - Amount of leave is based on their regular rate of pay and the hours worked in the past 6 months
- For employees with less than a 6-month work history:
 - Amount of leave is based on the regular rate of pay and the hours agreed upon at hire or the expected hours to be worked

What About Employees with Irregular Schedules?

- If an employee worked at variable hourly rates or piece rates, an employer may take the average and divide by the total hours worked to get the regular rate of pay
 - *Example:* Joe worked under a light commercial rate and a full commercial rate during the 6-month measurement period. He was paid a total of \$30k during that period and worked 840 hours. In this case, Bill's regular rate of pay is \$35.71 per hour.

Example: Paid Sick Leave/Hourly Employee

- Bob was possibly exposed to COVID-19 and must isolate himself. Bob has worked for ABC Company for the last 8 months. Over the past 6 months, Bob averaged 35 hours per week. Bob therefore gets 70 hours Paid Sick Leave.
- Bob's rate of pay was \$35 per hour. Bob receives \$245 per day ($\35×7 hours per day worked).

Example: Sick Leave and FMLEA/Hourly Employee

- Same facts, but this time Bob takes his leave because his son is home due to a school closing
 - Bob gets 70 hours of Paid Sick Leave at the rate of \$163.33 per day (2/3 of Bob's daily pay) because the reason Bob needs the leave is not for himself, but rather to care for his son
 - Bob can also take FMLEA Leave for another 10 weeks at the same rate of \$163.33 per day

Example: Sick Leave and FMLEA/Hourly Employee with Overtime

- Kelly worked for ABC Company for the last 8 months. Over the past 6 months, Kelly averaged 45 hours per week. Kelly's daughter is home from school, Kelly cannot work remotely, and daycare is closed due to a shutdown order. Kelly's regular rate of pay is \$30 per hour
- Let's take on the Sick Leave and FMLEA separately

Example: Sick Leave and FMLEA/Hourly Employee with Overtime

- Sick Leave: Kelly's overtime hours count, so she gets 80 hours of sick leave at \$180 per day (2/3 of \$30 per hour x 9 hours per day)
- FMLEA: Kelly's overtime hours also count here, so her daily rate for the FMLEA duration will still be \$180 per day

Example: Salaried Employee/Paid Sick Leave

- *Example:* Full time employee
 - Sally works for XYZ Company and is paid a salary of \$75,000 per year as a manager. Sally has COVID-19 so she must quarantine
 - Sally will receive her regular rate of pay for 80 hours of leave, which is approximately \$288.46 per day (assuming 2,080 hours per year)
 - Sally's pay is under the maximum of \$511

Part IV: How Do Employers Get Paid Back?

- In this Part we will discuss:
 1. How do employers get paid back for the cost of providing the Paid Sick Leave and FMLEA?

How Do Employers Get Paid Back?

- Employers get reimbursed for Paid Sick Leave and FMLEA through payroll tax credits
- The IRS announced it will allow employers to start taking payroll tax credits now rather than wait for additional guidance

How Do Employers Get Paid Back?

- Companies with insufficient liability to offset can request direct reimbursement from the IRS
- The credit may also be increased due to higher expenses associated with providing health coverage that come from the COVID-19 outbreak

How Do Employers Get Paid Back?

- In a recent circular, the IRS gave two examples:
 - 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.

How Do Employers Get Paid Back?

- Here is the second example:
 - 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.

How Do Employers Get Paid Back?

- This is a complex tax issue, and so called “stay at home” orders can play a role, employers should consult their CPA and payroll companies to determine what the best course of action is

Part V: Reminders and a Special Rule for Multiemployer Plans

- In this Part we will discuss:
 1. Reminders for employers that apply for both the Paid Sick Leave and the FMLEA
 2. A special rule applicable employers providing Paid Sick Leave and FMLEA that are signatory to multiemployer plans

Reminders!

- Paid Sick Leave is in addition to whatever the employer currently provides for sick leave/PTO
- Employers cannot change their policy to take away existing sick leave or PTO
- Employers may have to make fringe benefit payments during the leave periods

Reminders!

- The new Paid Sick Leave is not retroactive
- Employers cannot deny the new Paid Sick Leave even if they have already provided other forms of sick leave or PTO to the employee

Reminders!

- Posting is required. DoL has put out a model employers can use as well as Q&As on the posting requirements
 - https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- Closed offices may mail the notice, or post it on an external or internal website per the DoL

Reminders!

- Paid Sick Leave and Unemployment
 - Normally if a person is on a form of paid leave they are not “separated from employment” and so they are not entitled to unemployment
 - But each state’s requirement vary, some states may permit a “double dip” or allow the two to combine to reach a certain maximum. Check state rules.

Special Rule for Multiemployer Plans

- The Act provides a mechanism where multiemployer plans can act as a pass through for the amounts the employer is required pay for Paid Sick Leave and FMLEA
- The receiving multiemployer plan would have to develop a process to pay the leave out or modify an existing one to do so

Special Rule for Multiemployer Plans

- Even under this scenario, the obligation remains with the employer to pay the required leave
- In other words, making pension, health and other required contributions does not exempt the employer from complying with the FFCRA

Part VI: Requirements for Health Plans

- Group plans (including grandfathered plans) must cover the cost of COVID-19 testing without cost-sharing
- The statute appears to require coverage for all services and items leading up to a COVID-19 test

Requirements for Group Health Plans

- It is conceivable that funds could receive bills for tests for other conditions (*i.e.*, flu) that are classified as evaluation for COVID-19 testing
- Treating this as an ACA preventive service is likely a good safe harbor until guidance is issued

Part VII: Considerations for Trustees

- In this Part we will discuss:
 1. What should multiemployer plan trustees be thinking about as this crisis continues?
 2. We will touch on a few key points on welfare plans, pension plans, and supplemental plans like training trusts, vacation plans, and supplemental unemployment plans

Considerations for Trustees

- Health & Welfare Plans:
 - Reviewing eligibility and coordination rules for Supplemental Unemployment and Short-Term Disability benefits
 - Watch reserves on health plans, a combination of investment losses, low hours, and high claims could quickly burn up cash reserves
 - Investments: What are your cash flow needs? Are you in line with your Investment Policy Statement?

Considerations for Trustees

- DC/401k Plans
 - Keep an eye on hardships and loans for DC/401k Plans
 - Federal stimulus package to allow up to \$100k to come out with no excise tax and deferral of income tax payments, may create a run on the bank
 - An uptick in applications is likely, even if a combination of new leave, federal checks, and federal bolstering of unemployment benefits equates to full income replacement

Considerations for Trustees

- DC/401k Plans
 - Holdback percentage for distributions and hardships— is yours enough to cover recent investment losses?
 - May want to consider holding back up to 50% of balance, especially if your fund does not do daily valuations of assets

Considerations for Trustees

- DB Pension Plans
 - Be mindful of your liquidity needs and any need to update your Investment Policy Statement
 - Is your actuarial valuation happening soon?
Investment losses may result in shifts between PPA zone statuses
 - Coordinate with your consultant, actuary and counsel on next steps if your plan will slide from one zone to another

Considerations for Trustees

- Training Funds
 - In states with shelter at home orders, many are closed although state orders generally apply to K-12 schools not ERISA governed training centers
 - DoL has not formally taken a position, but is instead advising schools to comply with state orders
 - Stay in touch with apprentices, keep them informed

Considerations for Trustees

- Vacation Funds
 - Most do one or two distributions per year
 - Plan documents may allow for additional distributions at discretion of trustees
 - Review your plan documents, you can always amend to allow for an emergency distribution

Considerations for Trustees

- Supplemental Unemployment Benefit Funds
 - Many plans are expanding eligibility or increasing benefits
 - But, be careful. If the new stimulus bill puts up to \$600 on top of state unemployment benefits through 12/31/2020, adding more \$\$ to the mix may create a disincentive to return to work
 - Plans still must consider their long-term viability, and work hours are a necessary and critical component

Considerations for Trustees

- Fringe benefit collections
 - Look at your collection policy and CBA
 - Bargaining parties and trustees on collection committees may want to relax assessment of LDs and related penalties for late contributions temporarily
 - A combination of an MOU between the bargaining parties and updates to the collection policy at the fund level may be needed

Considerations for Trustees

- Fringe benefit and other collection actions
 - Many courts are closed, but many still allow some form of e-filing
 - Funds still need to preserve claims for fringe benefit collection and withdrawal liability
 - Work with your fund counsel to ensure deadlines are being met or extensions are secured

Key Takeaways

- This is a fluid situation, so keep an eye out as new guidance is issued
- Employers will be doing a lot of risk assessment between paid leaves, unemployment, tax credits, and possible payroll loans under the new stimulus package
- Employees will also be doing the same, the combination of all these programs will be confusing and may occasionally create disincentives to work
- Even though you may not be able to meet in person, maintain your meeting schedules for employee benefit plans, and meet in between if needed—stay on top of your plans!