

# Bender's Labor & Employment Bulletin

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## **COVID-19 PAID LEAVE UNDER THE FFCRA AND QUALIFYING EXEMPTIONS: Understanding the Law and Carefully Considering Its Applicability**

**By Adam S. Forman and RyAnn McKay Hooper**

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (“FFCRA” or “Act”).<sup>1</sup> The Act, which took effect on April 1, 2020, is a sweeping piece of legislation aimed at reducing the economic impact of the 2019 novel coronavirus (“coronavirus” or “COVID-19”) on workers and their families.

Among other emergency aid, the Act: (a) amends the federal Family and Medical Leave Act (“FMLA”) to provide a paid family leave benefit; (b) grants emergency paid sick leave benefits; and (c) enhances the availability of unemployment insurance to certain workers personally affected, or with a family member affected, by the coronavirus. FFCRA also provides a refundable tax credit for private-sector employers for qualified leave paid by an employer under the Act.

Subsequently, on March 27, 2020, President Trump signed into law the “Coronavirus Aid, Relief, and Economic Security Act” (the “CARES Act”), which provides certain key amendments to the FFCRA permitting, *inter alia*, tax credit advances for employers who provide paid sick and family and medical leave to employees.<sup>2</sup>

The FFCRA’s requirement to provide paid sick and family leave benefits, and the attendant tax credit, apply to all private employers with fewer than 500 employees and to all public employers. The Act also includes language stating that businesses with less than fifty (50) employees (“small business”) may qualify for an exemption from the provision of leave under the FFCRA. On April 6, 2020, the United States Department of Labor (“DOL”) announced a Final Temporary Rule (“DOL Temporary Rule”) which provides specific criteria for a small business to determine if it is exempt from the requirement to provide paid sick leave due to school closures or childcare unavailability.<sup>3</sup> A business with less than fifty (50) employees that

<sup>1</sup> Public Law 116-127: Families First Coronavirus Response Act (H.R.6201 - FFCRA, 03/18/2020).

<sup>2</sup> Public Law 116-136: The CARES Act (H.R. 748, 03/27/2020).

<sup>3</sup> Paid Leave Under the Families First Coronavirus Response Act, 29 C.F.R. § 826. 2020 (Announcing Temporary Rule). Accessed at <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>.

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**COVID-19 PAID LEAVE UNDER THE FFCRA AND QUALIFYING EXEMPTIONS: Understanding the Law and Carefully Considering Its Applicability**  
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qualifies for the exemption, however, is still required to provide up to ten (10) days of paid sick leave to an employee who is subject to a COVID-19 quarantine order, caring for someone subject to an order, or experiencing COVID-19 related symptoms and seeking medical diagnosis.

According to the New York Times, more than 75% of workers in the United States are employed by companies which qualify for exemptions to the federal paid leave mandate.<sup>4</sup> This gap in coverage may present a unique opportunity for employers exempt from the provisions of FFCRA who seek to preserve business but also attract and retain talent who require greater flexibility to respond to life and family challenges that are inherent to this pandemic. As outspoken billionaire entrepreneur Mark Cuban stated “How companies respond to that very question is going to define their brand for decades. If you rushed in [and returned an employee to work too soon or denied an employee paid leave] and somebody got sick, you were that company. If you didn’t take care of your employees or stakeholders and put them first, you were that company.”<sup>5</sup> Consequently, exempt businesses must approach their need for an exemption against the potential public image impact of denying employees needed paid leave.

This article will look at the FFCRA and its many exemptions, its intersection with state provided paid leave arising from the pandemic (with an emphasis on New York state law), and alternatives to seeking exemptions which companies may explore which permit a company’s public image to shine in the face of financial pressure.

<sup>4</sup> Cochran, Emily. (2 April 2020). Trump Administration Scales Back Paid Leave in Coronavirus Relief Law. Retrieved from <https://www.nytimes.com/2020/04/02/us/politics/coronavirus-paid-leave.html>. See also, United States. Bureau of Labor Statistics “National Business Employment Dynamics Data by Firm Size Class, Table F,” 29 January 2020. <https://www.bls.gov/bdm/bdmfirmsize.htm>. Accessed 8 April 2020.

<sup>5</sup> Stankiewicz, Kevin. (27 March 2020). Mark Cuban Says How Companies Treat Workers During Pandemic Could Define Their Brand ‘For Decades.’ 2019 CNBC LLC. Retrieved from <https://www-cnbc-com.cdn.ampproject.org/c/s/www.cnbc.com/amp/2020/03/25/coronavirus-mark-cuban-warns-against-rushing-employees-back-to-work.html>.

## The FFCRA Basics

The FFCRA both expands employee access to family medical leave and provides employees with emergency paid sick leave. With respect to the former, the Emergency Family Medical Leave Expansion Act (“EFMLEA”) amends the existing federal FMLA to provide up to twelve (12) weeks of leave to eligible employees of covered employers because of a qualifying need related to a public health emergency, such as an employee’s inability to work because of inaccessibility to child care coverage as a result of school or child care closure.<sup>6</sup> An employee employed for at least thirty (30) days is eligible to receive the EFMLEA benefit.<sup>7</sup> The first ten days of an employee’s twelve (12) weeks of leave are unpaid and the remaining weeks of paid leave must not exceed \$200 per day and \$10,000 in the aggregate. After the first 10 days, leave will be paid and calculated as follows:

- at a rate not less than two-thirds (2/3) of the employee’s “regular rate of pay” (as defined under the federal Fair Labor Standards Act), based on the number of hours the employee would otherwise be normally scheduled to work, and
- if the employee’s schedule varies from week to week, benefits under the FFCRA will be calculated based on the following: (1) the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the leave begins (including hours for which the employee took leave of any type), or (2) if the employee did not work over that period, the reasonable expected schedule, as established at the time of hiring.

An employee is only eligible for EFMLEA leave where: (a) an employee is unable to work because the employee must care for his or her son or daughter under 18 years of age whose school or place of care is closed or whose child care provider is unavailable due to a public health emergency; and (b) the employee cannot work onsite or through telework.

Job preservation is a key element of the EFMLEA and most covered employers will be subject to reinstatement obligations for employees who takes this leave. Reinstatement obligations, however, are limited when the employer employs fewer than 25 employees. Also, as with regular FMLA, employees are not protected from employment

<sup>6</sup> See 29 C.F.R. § 826, *supra*. Accessed at <https://www.federalregister.gov/d/2020-07237/p-9>.

<sup>7</sup> This differs from typical FMLA employee eligibility requirements (e.g., one year of employment, worked 1,250 hours).

actions, such as layoffs, that would have affected the employee regardless of whether the employee took leave.

Because the EFMLEA is an amendment to the FMLA, the prohibitions on discrimination and retaliation against employees for taking FMLA leave will apply to any leave taken under this provision.

The second portion of the legislation, known as the Emergency Paid Sick Leave Act ("EPSLA") provides for up to eighty hours (80) of paid leave if:

- An employee is subject to a quarantine or isolation order because of COVID-19
- An employee has been advised by a healthcare provider to self-quarantine because of COVID-19 or is experiencing COVID-19 symptoms and is seeking a medical diagnosis
- An employee is caring for an individual who has been told to quarantine or isolate
- An employee is caring for a son or daughter under the age of eighteen (18) and their school or child care is closed or unavailable due to COVID-19 measures.

For EPSLA the law places a limit on the amount of pay an employee taking leave may collect:

- \$511 per day or \$5,110 in aggregate where leave is taken because the employee is subject to a quarantine order, has been advised to self-quarantine, or is seeking a medical diagnosis related to COVID-19
- \$200 per day or \$2,000 in aggregate where the leave is taken because the employee is caring for an individual who has been told to quarantine or is caring for a son or daughter under the age of eighteen because school or child care is closed or unavailable due to COVID-19.

EPSLA benefits can run concurrently with those provided under the EFMLEA when taken for school or childcare closure or unavailability. The first two weeks of leave may be paid under the EPSLA and the subsequent weeks are paid under the EFMLEA.

Under FFCRA, covered private employers are entitled to fully refundable tax credits to cover the cost of the EFMLEA and EPSLA leave required to be paid for these periods of time during which employees are unable to work.<sup>8</sup>

<sup>8</sup> IRS, COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs. Accessed 11 April 2020 at <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.

All covered employers must post a mandatory notice posting in their workplace which notifies employees of their available rights under both parts of the FFCRA, even if the workplace is closed because of state shelter-in-place or related restriction. The notice can be posted in places where notices are typically posted, emailed or posted to the company intranet.<sup>9</sup>

Employers are required to retain all documentation (written or oral) provided relating to the need for FFCRA leave for four (4) years, regardless of whether the request for leave was granted or denied.<sup>10</sup> Further, employees may take EPSLA and expanded EFMLEA intermittently, but only if the employer agrees, and the employee is teleworking. Where an employee is physically in the workplace, an employee may take leave in full day increments.<sup>11</sup>

Employees covered by a collective bargaining agreement ("CBA") are eligible for benefits provided by the FFCRA under both portions of the law and the employer must satisfy its obligation to provide FFCRA benefits consistent with its obligations under the terms of any applicable collective bargaining agreement. If, however an employer is a signatory to a multiemployer CBA, the employer may satisfy both its paid sick leave and expanded family medical leave obligations by making contributions to the multiemployer fund, plan, or other program based on the number of hours of pay to which each employee is entitled, consistent with the terms of the multiemployer collective bargaining agreement.<sup>12</sup> Additionally, the FFCRA permits employees to earn pay from the multiemployer plan.

The FFCRA went into effect on April 1, 2020 and expires December 31, 2020.

## Exemptions to the FFCRA

The FFCRA provides that the DOL Secretary of Labor has the authority to issue regulations to (i) exempt certain employers with fewer than 50 employees from providing

<sup>9</sup> The recommendation from the DOL is to notify employees via email or post the notice to the company intranet where the office is closed. A copy of the DOL FFCRA poster can be found at <https://www.dol.gov/agencies/whd/posters>.

<sup>10</sup> See DOL Families First Coronavirus Response Act: Questions and Answers, Question 15. Accessed 11 April 2020 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

<sup>11</sup> See DOL Families First Coronavirus Response Act: Questions and Answers, Question 20 and 21. Accessed 11 April 2020 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

<sup>12</sup> See *Id.*, at Question 35.

EFMLEA under the FFCRA “when the imposition of such requirements would jeopardize the viability of the business as a going concern,” (“small business exception”) and (ii) exclude certain health care providers and emergency responders from the definition of “eligible employee.”<sup>13</sup> The Act also permits an employer of a health care provider or an emergency responder “to exclude such employee” from the paid leave entitlement, without prior approval from the DOL (“healthcare and emergency responder exception”).

On March 28, 2020, the DOL offered updated an updated set of Question and Answers and provided additional guidance addressing the uncertainty generated by the small business and health care industry exemption included in the Law.<sup>14</sup>

### The Small Business Exemption

First, the DOL clarified when a “small business” with less than fifty (50) employees may seek an exemption from providing paid leave under the FFCRA. Small businesses are exempt from the requirement to provide EPSLA due to school or child care provider closure or unavailability when “the imposition would of such requirements would jeopardize the viability of the small business as a going concern.”<sup>15</sup> A covered small business, however, is still required to provide EFMLEA paid leave to qualifying employees.<sup>16</sup>

To assist small businesses in assessing whether providing EPSLA paid leave would jeopardize the viability of its business, the DOL determined that the business may claim the exemption if any one of the following three was determined by an authorized officer of the business:

1. The provision of paid leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid leave or would entail a substantial

risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

3. There are not a sufficient number of workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid leave, and such labor is needed for the small business to operate at a minimal capacity.<sup>17</sup>

To elect the small business exemption, a business need not apply or contact the DOL.<sup>18</sup> Documenting the criteria for the exemption (such as in a business record) is sufficient and the DOL announced it would provide further guidance at a later date.<sup>19</sup> Moreover, the regulations also state that regardless of whether a small business employer exempts one or more employees, the small business employer is still required to post the FFCRA notice.<sup>20</sup>

### The Health Care Provider Exemption

The guidance further establishes what additional exceptions to those partially affiliated with COVID-19 and the health-care industry. With respect to the health care exception, the DOL explained that a health care provider is anyone employed at a doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer or entity where medical services are provided.<sup>21</sup> Notably, this exemption includes any person employed by a company that contracts with any of the above named entities to provide a service or maintain the facility and any company which provides services or products or that

<sup>13</sup> Paid Leave Under the Families First Coronavirus Response Act, 29 C.F.R. § 826. 2020.

<sup>14</sup> DOL Families First Coronavirus Response Act: Questions and Answers. Accessed 11 April 2020 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

<sup>15</sup> This exemption includes religious and non-profit organizations.

<sup>16</sup> Notably, the DOL’s responses to question 59 of the guidance is limited in its response, suggesting that the small business exemption does not apply to child-care-related paid leave, but possibly not emergency paid sick leave for employees to care for. Arguably this provision may exclude EFMLEA leave from exemption.

<sup>17</sup> See DOL Families First Coronavirus Response Act: Questions and Answers, Question 58. Accessed 11 April 2020 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

<sup>18</sup> *Id.*, at Question 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* Additional information is also available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>.

<sup>21</sup> See DOL Families First Coronavirus Response Act: Questions and Answers, Question 56-57. Accessed 11 April 2020 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

is involved in making COVID-19 related equipment, drugs, products, vaccines, and tests.<sup>22</sup>

It is also important to note that it is a health care or related provider's choice to elect the exemption. An employer can always opt to provide the leave even if it qualifies for an exemption.

### The Emergency Responder Exemption

The DOL also provides an expansive definition for the term "emergency responder," exempting any "employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19."<sup>23</sup> Giving examples, the DOL suggests that this exemption includes police, military or national guard, correctional institution personnel, EMS personnel, doctors, nurses, paramedics, 911 operators, public works personnel, fire fighters, and individuals with specialized training and skills that are needed to aid in a declared emergency, as well as anyone who works at a facility employing these categories or who is needed to maintain operations.<sup>24</sup>

### **State Provided COVID-19 Paid Leave: New York**

States are also stepping into provide paid leave for COVID-19 who are not qualified for paid leave under the FFCRA. In some cases, the state leave is above and beyond that which the federal government provides. For example, on March 18, 2020, the state of New York adopted new legislation in response to the spread of the COVID-19, called the New York Sick Leave Law ("NYSLL").<sup>25</sup> The legislation provides employees, who are subject to a COVID-19 mandatory or precautionary quarantine or isolation order, with immediate paid or unpaid time off specific to the current crisis. The FFCRA also provides for disability and paid family leave benefits for eligible workers.

Unlike the FFCRA, however, the NYSLL does not have a sunset provision, whereby benefits end on a date certain (i.e., December 31, 2020). The NYSLL applies to all private employers in New York State, regardless of the size of their workforce. The FFCRA requires employers to provide sick leave to employees who are subject to a mandatory or precautionary order of COVID-19 quarantine or isolation issued by the State, the Department of Health, a local board of health, or any other governmental entity duly authorized

to issue such an order ("Quarantine Order" or "QO"). It does not, however, apply to a New York-based employee who is: (1) asymptomatic or has not yet been diagnosed with any medical condition, and (2) physically able to work remotely while under quarantine. Retroactive benefits are available to employees who obtained a QO prior to March 18, 2020. Accordingly, employers covered by both laws will need to assess their obligations under both the FFCRA and New York State law.

Leave benefits available to the employee depend on the size and net income of their employer:

- Employers with ten (10) or fewer employees as of January 1, 2020, must provide eligible employees with job-protected unpaid sick leave for the duration of the QO. Employees who do not receive paid sick time may be eligible for paid family leave ("PFL") benefits and/or short-term disability insurance ("STD") benefits.
- Employers with ten (10) or fewer employees as of January 1, 2020, but with a net income greater than \$1 million in the previous year, and employers with between 11 and 99 employees (regardless of their net income) must provide eligible employees with at least five days of job-protected paid sick leave, as well as job-protected unpaid leave for the duration of the QO. As discussed below, after employees have exhausted their employer-provided paid sick leave benefits, they may be eligible for PFL and STD benefits for the remaining duration of the QO.<sup>26</sup>
- Employers with more than 100 employees as of January 1, 2020 must provide eligible employees with at least fourteen (14) days of job-protected paid sick leave "during" the QO.

<sup>26</sup> In addition to the sick leave benefits provided by the Law, an employee may be eligible for both STD and PFL benefits, for which they may apply through their employer's insurance carrier. (Note: Normally, employees would not be entitled to PFL benefits under New York's Paid Family Leave Act for their own illness; however, the Law creates an exception for workers who are subject to a QO). PFL benefits will be available for employees who are unable to telework and who either (i) are under a Quarantine Order, or (ii) must care for a minor dependent child who is subject to a QO. Employees may collect up to \$840.70 per week in PFL benefits and STD and PFL benefits may run concurrently. See New York Paid Family Leave COVID-19: Frequently Asked Questions. Accessed 11 April 2020 at <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, at Question 57.

<sup>24</sup> *Id.*

<sup>25</sup> Senate Bill S8091 ("Paid Sick Leave Law"), New York State Senate, signed into law by Governor Cuomo, March 18, 2020.

Notably, New York Sick Leave law is not available to an employee if leave is available under the FFRCA. The employee will receive the benefit of whichever law is more generous to the employee, but not both. Consequently, employers operate in New York and have more than 500 employees should plan to provide at least fourteen (14) days of paid sick leave and guaranteed job protection for the duration of an official QO.

While state law may provide the option for benefits beyond December 31, 2020, it excludes the leave provided by the FFRCA for care of an immediate family member (other than a child) or someone who resides in your home who is advised to isolate or subject to a QO.<sup>27</sup>

### **Takeaways: What Employers Should Do Now**

As the leave entitlements under the FFCRA began on April 1, 2020, it is important for an employer to determine whether it is covered by and in compliance with the FFRCA. Notwithstanding the latitude given to small employers to exempt employees from paid leave for child care, if you are a covered employer, take care to ensure that such exemption is clearly justified. If you intend to exempt health care providers and/or emergency responders, determine the parameters by which you intend to exclude such employees and document the reasons for doing so. Post the required notice of FFCRA benefits and inform employees of their rights to benefits under the law. If employees are not present in the workplace, consider posting the notice to an intranet site or emailing it to employees. You may need to post the notice in several ways to ensure that all employees receive the mandated notice. Be prepared to receive requests from employees seeking to take leave under the FFCRA, properly documenting leave requests and retaining required supporting information and documents.

An employer considering use of the small business exemption should carefully determine their qualification for the exemption and thoroughly document said exception. As state and federal law continues to develop and legislators seek to fill in the needs not met by the current law, small employers and other exempt entities may find that the provision of paid leave is still required under state law or by newly established legislation. As the law continues to develop, an exempt employer today may be a covered employer tomorrow.

It is important for exempt companies or companies with qualifying exempt employees to review company policies addressing paid leave as well. The provision or denial of paid leave will leave a lasting impression on any workforce – particularly given the amount of fear and speculation regarding the origin and outcomes of such an unprecedented national pandemic. Despite the availability of exemptions, companies should evaluate whether denying or granting leave is consistent with its company culture. Without doing so, a company could potentially face irreversible harm to its reputation and ability to succeed as business needs change and the financial pressures presented by the pandemic subside.

All employers should continue monitoring developments and be prepared to course correct as the circumstances and the law change and evolve.

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<sup>27</sup> See DOL Families First Coronavirus Response Act: Questions and Answers, Question 64. Accessed 11 April 2020 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.