

FAMILIES FIRST CORONAVIRUS RESPONSE ACT: EMERGENCY FAMILY AND MEDICAL LEAVE PROVISIONS (PART 2 OF 2)

Mar 20, 2020

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “FFCRA or Act”). The FFCRA provides for two types of leave for employees: Paid Sick Leave (up to 80 hours) and Emergency Family and Medical Leave (up to 12 weeks of combined paid and unpaid leave). This post is part 2 of 2 summarizing the requirements of the FFCRA and focuses on Emergency Family and Medical Leave.

SCOPE

Unlike the paid sick leave provisions of the FFCRA, the emergency family and medical leave provisions are not standalone law. Rather, these provisions amend the Family and Medical Leave Act (“FMLA”), thus providing for “Emergency FMLA” leave. However, the amendments (such as the changed definition of Covered Employer and Eligible Employee) apply only to Emergency FMLA provisions and do not amend the pre-existing provisions of the FMLA.

EFFECTIVE DATES

The Act will become effective no later than April 2, 2020 and expire on December 31, 2020.

COVERED EMPLOYER

Anyone who has **fewer than 500 employees**^[1] and otherwise satisfies the elements of the definition of “Employer” under the FMLA.^[2]

EXCEPTIONS

- DOL may issue guidance excluding employers with fewer than 50 employees from the requirement to provide Emergency FMLA, if the Emergency FMLA would “jeopardize the viability of the business as a going concern.”

- Regardless of whether such guidance is issued, employers with fewer than 50 employees will not be subject to an FMLA action by employees for failing to provide Emergency FMLA leave to employees, but may be subject to an enforcement action by the U.S. Department of Labor.

ELIGIBLE EMPLOYEES

Employees who have been employed by a covered employer for **at least 30 calendar days** are eligible for Emergency FMLA leave.

- **Exception:** If an employee is a healthcare provider or an emergency responder, the employer may choose not to provide Emergency FMLA to those employees. (The Department of Labor may issue guidance on this point.)

Affirmative Requirement under the Act: Covered employers must provide up to 12 weeks of partially paid, job-protected, Emergency FMLA leave to employees due to an emergency related to COVID-19 as declared by the federal, state, or local authority (a “Public Health Emergency”). Note that Emergency FMLA leave is simply a new (and temporary) category of FMLA leave and will be subject to the familiar restriction that an employee is entitled to take only twelve (12) weeks of FMLA leave (for all qualifying reasons combined) in the applicable 12-month period (except for Military Caregiver leave).

- More specifically, the only circumstance under which Emergency FMLA may be taken is when the employee is unable to work (or telework) because the employee is caring for the employee’s child (who is under age 18), because the child’s school or child care provider is closed/unavailable due to a Public Health Emergency.

PAID V. UNPAID EMERGENCY FMLA

To the extent an employee has FMLA leave available to use as Emergency FMLA leave, whether such Emergency Leave is paid or unpaid will depend on how much Emergency FMLA leave is used and whether the employee has other forms of paid leave which can be substituted during the unpaid portion:

- **Unpaid:** The first 2 weeks (10 work days) of Emergency FMLA leave is unpaid. However, the employee may choose to substitute any other available accrued paid leave during this otherwise unpaid period, including but not limited to paid sick leave available under the paid sick leave provisions of the FFCRA.
- **Paid:** Any remaining Emergency FMLA leave taken after the first 2 weeks (10 work days) of Emergency FMLA must be paid.

RATE AND CALCULATION OF COMPENSATION FOR EMERGENCY FMLA

- **Rate of Compensation:** Paid Emergency FMLA must be paid at 2/3 the employee's regular rate of pay.
- **Calculation:** 2/3 employee's regular rate of pay multiplied by the number of hours that the employee is otherwise scheduled to work during the period of the leave.
 - Note: If an employee's schedule varies from week to week, the Act provides a special calculation formula.
- Paid FMLA is capped at \$200/day (and \$10,000 in the aggregate) per employee.

Notice: If the need for Emergency FMLA is foreseeable, the employee should provide as much advanced notice as possible.

SPECIAL RULES FOR MULTI-EMPLOYER BARGAINING AGREEMENTS

- Provided it is consistent with the employer's bargaining obligations and collective bargaining agreement ("CBA"), employers may satisfy their Emergency FMLA obligations by making a contribution to a multi-employer fund/plan/program IF: (i) the fund/plan/program allows employees to secure funds for hours worked under the CBA and (ii) employees can use such funds for the same reasons for which they would otherwise be entitled to Emergency FMLA.
- The contribution should be equal to the paid leave that each employee would be entitled to under the CBA.

Exception to Job Restoration Requirement for Smaller Employers: Employers with fewer than 25 employees are excluded from the requirement that employees' Emergency FMLA leave be job-protected **if all of the following are true:**

- Upon the employee's return from Emergency FMLA leave, the employee's previous position no longer exists due to the employer's economic conditions or other changes in operating conditions that:
 - Affect employment; and
 - Are caused by a Public Health Emergency;

- Upon the employee's return from Emergency FMLA leave, the employer makes reasonable efforts to restore the employee to an equivalent position (including equivalent in terms of benefits, pay, and other terms/conditions) but no reasonable equivalent position is available; and
- Although the employer is not able to reinstate the employee following the employee's use of Emergency FMLA leave, the employer continues to make efforts to find a reasonable equivalent job for the employee (and reach out to the employee to offer such position) for a 1 year period following the earlier of:
 - The date on which the need for Emergency FMLA concludes; and
 - The date that is 12-weeks after the date on which the employee's Emergency FMLA began.

[1] Although not expressly clear in the FFCRA, based on the cross-references to the FMLA and the FLSA, it appears that the determination of whether an employer has fewer than 500 employees will be: (a) based on the number of U.S. employees; and (b) measured separately for each employing entity, rather than by aggregating all employees in an "enterprise" or "controlled group." We anticipate clearer guidance from the Department of Labor on this subject, but until that is forthcoming, we recommend this conservative interpretation.

[2] An employer covered by the FMLA is generally defined as any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. 29 CFR § 825.104. For purposes of Emergency FMLA leave under the Act, "50 or more" is amended to read "fewer than 500."

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM



Lily J. Kurland

Washington

lily.kurland@bclplaw.com

+1 202 508 6106



Christy E. Phanthavong

Chicago

[christy.phanthavong@bclplaw.co](mailto:christy.phanthavong@bclplaw.com)

m

+1 312 602 5185

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