

SUMMARY OF THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

by Paul N. Lalley, Esquire

The Families First Coronavirus Response Act (FFCRA) is part of Congress' comprehensive legislative response to the economic and public health crisis caused by the coronavirus pandemic. The FFCRA includes a number of changes to public assistance programs, unemployment compensation benefits administration, as well as mandates for certain paid leave related to coronavirus-related work absences. The FFCRA is really a collection of legislation on different subjects related to the coronavirus emergency, some of which amend existing legislation (such as, temporarily, the Family and Medical Leave Act), other portions of which are new legislation. This summary focuses on those aspects of the employment provisions of the FFCRA that impact state and local governments.

A. The Emergency Family and Medical Leave Expansion Act.

A major part of the FFCRA is the Emergency Family and Medical Leave Expansion Act (which we'll refer to as the "Expansion Act"). The Expansion Act makes significant amendments to the FMLA related to COVID-19 leaves that requires a part of the COVID-19 related leave to be paid leave. It amends Section 102(a)(1) of the FMLA – the section governing the reasons for taking FMLA leave – by adding a new subparagraph F that provides for leave "because of a qualifying need related to a public health emergency." This special provision for qualifying need related to a public health emergency leave under the FMLA has an automatic sunset provision: this type of leave is only available until December 31, 2020, so it is not intended as a permanent revision to the FMLA.

a. Special definitions of eligible employee and eligible employer specifically for "qualifying need related to a public health emergency leave."

The Expansion Act contains new definitions that apply *only* to qualifying need related to a public health emergency leave. An "eligible employee" for this leave is "an individual who has been employed for at least 30 days by the employer (i.e., the Expansion Act dispenses with the FMLA's requirement that the person has worked for the minimum of 1250 hours in the preceding year). The definition of "employer" to which this type of leave applies is "fewer than 500 employees" rather than the "50 or more employees" which must be present in order for other types of FMLA leave to apply to an employer.

b. Qualifying need related to a public health emergency.

A "qualifying need related to a public health emergency" means "the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency." The "child care provider" must be someone who receives compensation for the child care on a regular basis. The term public health emergency specifically means "an emergency with respect to COVID-19 as declared by a federal, state or local authority."

Editor's Note: Qualifying need related to a public health emergency leave does not apply to the employee's need for leave due to his or her own COVID-19 illness. Paid leave for those circumstances is provided in a separate provision of the FFCRA – the new Emergency Paid Sick Leave Act, discussed below.

- c. **The Expansion Act mandates partial paid leave (subject to a \$200 per day and \$10,000 aggregate limit) after the first 10 days of leave due to a qualifying need related to a public health emergency.**

The first 10 days that an employee takes qualifying need related to a public health emergency leave are unpaid, but the employee may elect to use available paid leave (accrued vacation leave, personal leave, or medical or sick leave) for the first 10 days of this leave. After the first 10 days of this leave, the employer “shall provide paid leave for each day of leave ... that an employee takes after taking leave ... for 10 days.”

The special paid leave for qualifying need related to a public health emergency is not the person's full salary, and there are caps on the total amount the employer must pay for the duration of this leave.

The paid leave is based on an amount that is “not less than 2/3 of the employee's regular rate of pay (as determined by Section 7(e) of the Fair Labor Standards Act)” times the “number of hours the employee would otherwise normally be scheduled to work.” For employees who have varying hours and the employer cannot determine the number of hours the employee would otherwise normally be scheduled to work, the Expansion Act requires that the employer take the average number of hours scheduled per day over the six-month period (including days where the employee was on “any type” of leave) ending on the date that the employee takes this leave. If the employee with varying hours has not worked that long, then the employer must use “the reasonable expectation of the employee at the time of hiring” as to the average number of hours per day the employee would be scheduled to work.

The Expansion Act limits the amount that an employer is obligated to pay for qualifying need related to a public health emergency leave. There is a \$200 per day limit, and a \$10,000 aggregate limit per employee for this leave.

- d. **There are different rules regarding restoration to a position following use of qualifying need related to a public health emergency leave.**

The qualifying need related to a public health emergency leave also has a different rule regarding restoration to a position upon the completion of the public health emergency leave. For employers who employ fewer than 25 employees, the employer can deny the person restoration to an equivalent position if: (1) the person took public health emergency leave; (2) the position held by the person prior to his or her leave “does not exist due to economic conditions or other changes in operating conditions of the employer” that affect employment and are caused by “a public health crisis” during the person's leave; (3) the employer makes “reasonable efforts” to restore an equivalent position (but is unable to do so); and, (4) the employer makes “reasonable efforts” to

contact the person if an equivalent position becomes available during a one-year period measured from the earlier of the date on which the qualifying need related to a public health emergency concludes, or the date that is 12 weeks after the date on which the employee’s public health emergency leave begins.

e. Exclusion of “emergency responders” from coverage under the Expansion Act.

The Expansion Act authorizes the Secretary of Labor to issue regulations “for good cause” to exclude “certain health care providers and emergency responders from the definition of ‘eligible employee,’” and to exempt “small businesses with less than 50 employees” from the Expansion Act’s requirements “when the imposition of such requirements would jeopardize the business as an ongoing concern.” Section 3105 of the Act also allows employers to exclude from coverage employees who are a “health care provider or emergency responder” from coverage under the Expansion Act. This exclusion is at the employer’s election, so it would appear that employers can choose to include or exclude emergency responders from qualifying need related to a public health emergency leave.

The Expansion Act takes effect within 15 days of its enactment.

B. The Emergency Unemployment Insurance Stabilization and Access Act of 2020.

The FFCRA provides full federal funding for extended unemployment compensation benefits for states that experience an increase of 10% or more in their unemployment rate over the previous year. This means a 10% *increase* to the state’s rate of unemployment – not an unemployment rate of 10%. For states that meet this threshold, the legislation provides for 100% of the extended unemployment compensation benefits (i.e., for the 26 weeks after the initial 26-week benefit period) to be funded by the federal government, instead of shared 50% by the states.

C. Emergency Paid Sick Leave Act.

The FFCRA also enacts a new Emergency Paid Sick Leave Act (the “EPSLA”). The EPSLA references the Fair Labor Standards Act’s definition of a “public agency,” and, therefore, applies to local governmental employers.

i. Eligibility for emergency paid sick time.

The EPSLA provides that an employer “shall provide each employee” with paid sick time “to the extent that the employee is unable to work (or telework) due to a need for leave because (1) the employee is subject to a local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is “caring for an individual” who is subject to a quarantine or isolation order, or has been advised by a health care adviser to self-quarantine; (5) the employee is caring for a son or daughter if the school or the place of care for the son or daughter has closed, or the child care provider is unavailable; or, (6) the employee “is experiencing any other substantially

similar condition specified by the Secretary of HHS, in consultation with the Secretary of the Treasury and the Secretary of Labor.”

ii. **Full-time employees entitled to 80 hours of paid leave.**

The EPSLA provides that full-time employees are entitled to 80 hours of paid sick leave, and part-time employees are entitled to paid sick leave based on the number of hours “that such employee works, on average, over a two-week period.” Employees cannot carryover unused paid sick leave from one year to the next. Paid sick leave terminates beginning with the employee’s next scheduled work shift following the termination of the need for paid sick leave. An employer may not require that the employee search for a replacement to cover the hours when the employee will be absent on paid sick leave. Employers cannot require that employees use other paid leave before the employee uses his or her EPSLA paid leave. Employees earn EPSLA paid sick time immediately upon employment.

iii. **The EPSLA limits the daily and aggregate amount that an employee is paid, depending on the reason for the leave.**

EPSLA paid sick time means an “increment of compensated leave” that is compensated at “not less than the greatest of”: (1) the employee’s regular rate of pay; (2) the federal minimum wage; or, (3) the state or local minimum wage. The employer uses the number of hours that the employee would normally be scheduled to work during the period of absence, but for employees with varying hours, the EPSLA follows the same formula as the Expansion Act.

There is, however, a daily and an aggregate limit of EPSLA compensation, which depends on the specific reasons for the person’s absence. For absences due to the employee’s own COVID-19 circumstances (the first three reasons for leave), the daily compensation limit is \$511 and the aggregate limit for the employee is \$5,110. But for absences due to caring for an individual, or school closure (the last three reasons for leave), the daily limit is \$200 and the aggregate limit is \$2,000. Also, the rate of compensation for absences due to caring for an individual or a school closure (the last three reasons for leave) is only 2/3 of the rate described in the preceding paragraph (again, subject to the \$200 daily limit).

iv. **Other provisions of the EPSLA.**

Employers must post a notice of employee’s rights under the EPSLA, and the Secretary of Labor is going to issue a model notice within seven days of the law’s enactment. The EPSLA protects taking adverse employment actions against a person who uses leave, or who has filed a complaint, instituted a proceeding, or testified (or is about to testify) in a proceeding related to the Act. The Act also subjects the failure to pay sick time to the same penalties as the failure to pay minimum wage under the Fair Labor Standards Act, and also provides FLSA penalties for any willful action that violates the nondiscrimination/non-retaliation provisions of the EPSLA.

Employers are not obligated to pay an employee for any unused EPSLA paid sick time upon that employee’s separation from employment. The EPSLA provides that nothing in the Act

shall be construed to “diminish” the rights or benefits that an employee is entitled to: (1) under any federal, state, or local law; (2) a collective bargaining agreement; or, (3) the employer’s policies.

The Secretary of Labor is to issue guidelines on the calculation of EPSLA paid leave within 15 days of its enactment. After the first day of EPSLA paid sick leave (or portion thereof), the employer may require that the employee follow “reasonable notice procedures” in order to continue such leave. Like the Expansion Act, the EPSLA also gives the Secretary the authority to issue regulations for “good cause” to exclude from coverage “certain health care providers and emergency responders” from the definition of “employee,” including by giving the employer the ability to opt out of the EPSLA’s scheme. Also like the Expansion Act, the EPSLA provides that an employer of an employee who is “a health care provider or an emergency responder” “may elect to exclude” the employee from the paid sick leave benefits provided under the EPSLA.

The EPSLA takes effect 15 days from its enactment, and sunsets on December 31, 2020.