



April 2, 2020

## The Families First Coronavirus Response Act Leave Provisions

This In Focus examines the Families First Coronavirus Response Act (FFCRA; P.L. 116-127) leave provisions, as amended by the CARES Act (P.L. 116-136), and regulations published by the Department of Labor (DOL) on April 1, 2020.

The FFCRA created two new and temporary leave benefits for eligible employees: (1) emergency Family and Medical Leave Act (FMLA) leave to care for the employee's minor child whose school or place of care is closed, or whose care provider is unavailable due to the Coronavirus Disease 2019 (COVID-19) public health emergency (such leave is paid leave after an initial 10 days of unpaid leave), and (2) paid sick leave for certain COVID-19 related needs. The FFCRA included tax credit provisions to help employers (including the self-employed) cover costs related to paid leave. Both paid leave benefits took effect on April 1, 2020, and apply to leave between April 1, 2020 and December 31, 2020.

### Division C—The Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (FFCRA, Division C) amended the FMLA to allow eligible employees of covered employers to use up to 12 workweeks of FMLA-protected leave to care for the employee's minor child whose school or care provider is unavailable due to a COVID-19 public health emergency (i.e., *emergency FMLA leave*). Further discussion of the FMLA is in CRS Report R44274, *The Family and Medical Leave Act: An Overview of Title I*, by Sarah A. Donovan.

#### Employee Eligibility and Employer Coverage

Unlike standard FMLA employee eligibility requirements—at least one year and 1,250 hours (in the last year) of employment with the current employer having at least 50 employees within 75 miles of the worksite—employees who have been with their current employer for at least 30 calendar days and work for a covered employer may use *emergency FMLA leave*. DOL regulations provide that employees meet this condition if they were on the employer's payroll for the 30 calendar days just before the day leave begins. Rehired employees may qualify for leave if they were laid off not earlier than March 1, 2020, worked for the employer for at least 30 of the 60 calendar days before the layoff, and were rehired by the same employer.

For emergency FMLA leave purposes, *covered employers* are private-sector employers employing fewer than 500 employees and certain public agencies, including state and local governments. For federal employee coverage, emergency FMLA leave is available to legislative branch employees covered by the Congressional Accountability Act of 1995, Government Accountability Office employees, Library of Congress employees, and other federal employees who are not covered by the family and medical

leave provisions in Subchapter V, Chapter 63, *U.S. Code*. The Office of Management and Budget (OMB) Director may exclude for good cause from the emergency FMLA leave requirements certain federal employers for certain categories of executive branch employees.

#### Provision of Paid Leave

In general, FMLA leave is unpaid. For emergency FMLA leave, the first 10 days may be unpaid, although the employee may elect to use other paid leave during that period. Covered employers must compensate employees for the remainder of emergency FMLA leave at two-thirds of their regular rate of pay. Such paid leave is capped at \$200 per day per employee up to \$10,000 total per employee.

#### Job Protection

FMLA leave is generally job-protected. That is, upon return from leave, with some exceptions, an employee must be reinstated to the job held before taking FMLA leave. This requirement does not apply to employers with fewer than 25 employees if the employee used emergency FMLA leave and certain conditions are met.

### Division E—The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (FFCRA, Division E) requires covered employers to provide paid sick leave to an employee who is unable to work (including telework) and (1) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) is experiencing symptoms of COVID-19 and is seeking medical diagnosis; (4) is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (5) is caring for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons; or (6) is experiencing any other substantially similar condition, as specified by the Secretary of Health and Human Services.

#### Provision of Paid Leave

Full-time employees are entitled to 80 hours of paid sick leave, and part-time employees must be provided the equivalent of two weeks of leave. DOL regulations provide that *part-time employees* are those employed for fewer than 40 hours per week. For leave taken for the employee's quarantine, self-isolation, or medical diagnosis, sick leave is compensated at the greater of the employee's regular rate of pay, the federal minimum wage, or the minimum wage rate in the applicable state or locality of employment. However, paid leave provided for these purposes is capped at \$511 per day and \$5,110 total per employee. For caregiving and other needs, the employer must compensate the employee at

two-thirds of the previously described amounts, and such paid leave is capped at \$200 per day and \$2,000 total per employee.

### Employee Eligibility and Employer Coverage

Like Division C's new FMLA provisions, Division E's paid sick leave provisions apply broadly to private-sector employers with fewer than 500 employees and to public-sector employees. The OMB Director may exclude for good cause certain federal civil service employees from the paid sick leave requirements, including by exempting certain executive branch employers, the U.S. Postal Service, and the Postal Regulatory Commission. However, unlike the emergency FMLA provisions, employees of covered employers are eligible regardless of the length of their employment.

### Small Business Exemption

The FFCRA authorized the Secretary of Labor to exempt businesses with fewer than 50 employees from providing emergency FMLA leave or paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons if such leave "would jeopardize the viability of the business as a going concern."

DOL regulations provide that these small businesses are exempt from providing emergency FMLA leave or paid sick leave if an authorized officer of the business has determined that (1) providing leave would make the small business's expenses and financial obligations exceed available business revenues and cause the small business to cease operating at a minimal capacity; (2) the absence of the employee requesting leave would entail a substantial risk to the financial health or operational capabilities of the small business because of the employee's specialized skills, knowledge of the business, or responsibilities; or (3) 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 labor or services provided by the employee on leave, and these labor or services are needed for the small business to operate at a minimal capacity. Businesses must document such determinations, but are not required to submit materials to DOL to receive the exemption.

### Employers of Health Care Providers and Emergency Responders

Employers of health care providers and emergency responders may exclude such employees from emergency FMLA leave or paid sick leave provisions. In addition, the Secretary of Labor may issue regulations that exclude such groups of workers from the leave provisions.

### Definition of Emergency Responder

The term *emergency responder* is not defined in the FFCRA. For purposes of the FFCRA's leave provisions, DOL regulations define the term to include "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of ... patients, or others needed for the response to COVID-19." The agency has identified law enforcement officers, correctional institution personnel, fire fighters, medical professionals and technicians, and emergency management and public works personnel as

examples of emergency responders. DOL allows the highest official of a state or territory, including the District of Columbia, to expand the term as needed.

### Definition of Health Care Provider

The FMLA defines a *health care provider* to include a state-licensed doctor of medicine or osteopathy or any other person determined by the Secretary of Labor to be capable of providing health care services. DOL regulations require that health care providers must be authorized to diagnose and treat physical or mental health conditions. For purposes of excluding certain health care providers from the application of the FFCRA's leave provisions, however, DOL regulations employ a broader definition that includes, for example, anyone employed at any doctor's office.

### Closures and Furloughs

Emergency FMLA leave and paid sick leave are available only for an individual who may be classified as an *employee* under Divisions C and E of the FFCRA. The FFCRA incorporates the Fair Labor Standards Act's (FLSA) definition of "employee," which is generally limited to individuals who are "suffer[ed] or permit[ed] to work" by an employer. Applying this definition, it would appear that an individual who works for an employer that closes its worksite or implements a furlough would no longer be permitted to work, and would likely not be an "employee" under the FFCRA. Although emergency FMLA leave and paid sick leave would not be available, such an individual may be eligible for unemployment benefits. Independent contractors are generally not considered "employees" for FLSA purposes. Thus, independent contractors are not entitled to emergency FMLA leave or paid sick leave from the entity that retains them.

### Enforcement

In general, enforcement of the FFCRA's emergency FMLA leave provisions will occur under Section 107 of the FMLA. This section permits employees to file civil actions against their employers for interfering with FMLA rights. However, for emergency FMLA leave, the FFCRA established a special rule for employers with fewer than 50 employees. An employee of such an employer may not file a civil claim to enforce his or her right to emergency FMLA leave. The Secretary of Labor may exercise his existing authority to seek injunctive and equitable relief for such an employee.

Enforcement of the FFCRA's paid sick leave provisions will occur in accordance with Sections 16 and 17 of the FLSA. These sections provide employees with a right to file civil actions against employers for unpaid wages, as well as the ability for the Secretary of Labor to seek injunctive relief and recover unpaid wages. Division E of the FFCRA did not establish a special rule for employers with fewer than 50 employees.

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