

March 23, 2020

Congress Enacts Emergency Coronavirus Response Legislation

By [Bruce Davis](#) and [John Lucas](#)

On March 18, 2020 President Trump signed the first of what is likely to be a flurry of legislative responses that provide relief and benefits to those impacted by the COVID-19 pandemic. The [Families First Coronavirus Response Act \(FFCRA\)](#) is an emergency bill that is effective **not later** than April 2, 2020 and is set to expire on December 31, 2020. It contains a number of provisions that may be of interest to employers, but this article will specifically focus on the following two aspects of the bill:

- Group health plan mandates to cover [FDA-approved COVID19 testing](#)
- Employer requirements to provide emergency paid sick leave to employees and the expansion of [FMLA](#).

Coverage for and No Cost Sharing of Certain COVID-19 Services

FFCRA requires that any group health plan, regardless of size, must provide coverage for the COVID-19 test and the related health care provider visit necessary to order or administer the test. Not only must these services be covered at 100% (with no deductible or copay applied), no prior authorizations, pre-certifications, or other medical management provisions may be imposed. It appears that it will come down to the discretion of the health care provider to determine the necessity of the test based upon clinical judgment and applicable state laws.

The IRS had previously issued guidance that provided that a high deductible health plan (HDHP) could provide first dollar coverage of COVID-19 testing without impacting the plan's status as an HSA eligible HDHP.

This requirement to cover testing costs starts immediately upon the enactment of this bill and will continue until the Secretary of the [Department of Health and Human Services](#) determines that the public health emergency has expired.

FFCRA specifically applies to testing and evaluation for testing, but it does not mandate that resulting treatment costs be provided without cost sharing. Employers will want to discuss these cost sharing waivers with their medical claims administrators and decide how to best communicate these provisions to covered employees.

Emergency Sick Leave and FMLA Expansion

The relevant provisions of FFCRA apply to all public agencies and private employers with less than 500 employees and the law requires these employers to provide paid sick leave and paid family and medical leave to employees who are impacted by Covid-19. Employers who pay for this leave that is required under FFCRA will receive refundable tax credits that can be applied against the employer portion of Social Security taxes. The amount of the tax credit varies based on the type of leave.

One explanation that was offered for not including employers with 500 or more employees in this mandate is that larger employers often are expected to already have salary continuation programs in place and that Congress did not want to expend federal funds (through the use of refundable tax credits) to subsidize those existing programs. Under FFCRA large employers could pay these same salary continuation benefits, but they would not receive tax credits against their Social Security tax obligation. It would not be surprising to see this issue revisited in future COVID-19 relief legislation.

FFCRA provided that an employer that employs health care providers or emergency responders is not required to pay the expanded FMLA and paid sick leave. Additionally, the DOL Secretary may exempt small businesses (fewer than 50 employees) from the following requirements if they would "jeopardize the viability of the business as a going concern". There are

no additional details yet on how an employer may apply for that exemption.

Employers may not change their paid leave policies once the legislation is enacted (April 1, 2020) to avoid being subject to the Act's paid sick time provisions.

Emergency Sick Paid Leave Act

Full-time employees, regardless of how long they have been employed, are immediately eligible for up to 80 hours of paid sick leave if the employee cannot work (or work from home) because they are:

- experiencing symptoms of COVID-19 and seeking a medical diagnosis; or
- if a government authority or health care provider orders the employee to self-quarantine due to COVID-19
- In the case of a) or b) the amount is equal to 100% of the employee's rate of pay, capped at \$511/day or \$5,110 over these 80 hours.

If the Full-time employee is not at work, because they are assisting someone who must be quarantined, then the amount is equal to two-thirds of the employee's rate of pay, capped at \$200/day or \$2,000 over the 80 hours.

If the Full-time employee is home caring for a child under age 18 because their school is closed or their compensated child care provider is unavailable due to the COVID-19 pandemic, the amount is again equal to two-thirds of the employee's rate of pay, capped at \$200/day or \$2,000 over the 80 hours.

Part-time employees under the same circumstances are to be paid their usual (average) 10 days of pay.

Employers must allow the employee to first use the paid sick leave under this law, and then the employee may decide to use any accrued paid leave under local law or the employer's policy. An employer may not require an employee use other paid leave before using this emergency paid sick leave.

If an employer that is required to pay emergency sick leave, then failure to do so is considered violation of the [Fair Labor Standards Act](#) that could subject the

employer to substantial civil and even potential criminal penalties.

Emergency FMLA Expansion

FFCRA amends FMLA to require an employer to allow the use of up to 12 weeks of job-protected FMLA emergency leave to any employee who has a "qualifying need" relating to the COVID-19 who have been employed for more than 30 days.

The first 10 days of this leave can be unpaid, with the remainder being paid. The employee can choose to substitute accrued vacation, personal or sick leave (including the emergency sick leave described above). After the first 10-day period, the amount of pay under this expanded FMLA leave is equal to two-thirds of the employee's rate and capped at \$200/day or \$10,000 over this period.

This expanded FMLA leave is available to those employees who must continue to care for a child under age 18 if their school is closed or their compensated child care provider is unavailable due to COVID-19—and the employee is not able to work from home.

The expanded FMLA leaves and paid sick leave rules would expire on December 31, 2020, and unused time would not carry over to 2021.

The FMLA rules relating to restoration of the employee's position upon the conclusion of FMLA emergency leave would apply. Employers with 25 or less employees would be exempted from the job restoration requirement if the job no longer exists due to economic reasons relating to the COVID-19 emergency.

New Tax Credits for Expanded Paid Sick Leave and FMLA

Employers subject to FICA tax will receive quarterly refundable tax credits equal to 100% of the "qualified sick leave wages" and 100% of "qualified family leave wages," and for this purpose the term "qualified" should be thought of as the wage continuation payments required by FFCRA.

In addition to the tax credits relating to continued wage payments, FFCRA provides for an increase in the tax credit equal to the amount of the employer's qualified

health plan expenses that are allocable to the extended FMLA or sick leave wages. It is unclear how this is intended to work, but based on its bill reference to [Code Section 106](#) it appears that employers would take a credit for the cost of premiums paid to the health plan that could be allocated to those periods the employee is receiving these extended FMLA or sick leave wages.

Questions? Please contact Bruce Davis at Bruce.Davis@findley.com or [419.327.4133](tel:419.327.4133) or contact John Lucas at John.Lucas@findley.com or [615.665.5329](tel:615.665.5329)