

On March 18, 2020, the President signed into law the “Families First Coronavirus Response Act” (“FFCRA”). The Act states that the sick pay and leave provisions discussed would be effective “no later than” 15 days after the Act was signed (i.e., no later than April 2, 2020). However, late in the day on March 24, the U.S. Department of Labor clarified that the paid leave provisions will be effective **on April 1, 2020**.

The Act provides for certain tax credits to pay for mandated sick pay and leave, but beware: payment of sick pay or leave that is not mandated will not qualify for the tax credits. Also, many employers have been concerned about the timing of the credits. On March 20, the Internal Revenue Service (“IRS”) announced that employers would be able to immediately recoup funds for the benefit payments by keeping a portion of the deposits it otherwise would pay as part of their employees’ federal, social security and Medicare taxes.

Here is a summary of what the Act provides for employers and employees:

- Up to Eighty (80) hours of paid sick leave (or the equivalent of two weeks for part-time employees) paid at the employee’s “regular rate” for many workers affected by the coronavirus.
- Up to twelve (12) weeks of job-protected leave for parents caring for a child under age 18 due to school closures, daycare closures, or childcare disruptions. The first ten (10) days of this leave may be without pay; the remainder is with pay at 2/3 of the employee’s regular rate. However, the eighty (80) hours of paid sick leave discussed above may in many situations run concurrently with the expanded leave described in this paragraph.

### ***Emergency Paid Sick Leave Act (“PSL”)***

- The Emergency Paid Sick Leave Act portion of the FFCRA requires all public employers and private employers with fewer than 500 employees (measured at the time an employee’s leave is to be taken) to provide an employee with up to two (2) weeks of *paid* sick leave (“PSL”) if the employee is unable to work (or telework) due to a need for leave because:
  - (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. (Important Note: there is uncertainty surrounding whether an employer who is forced to close because of a federal, state, or local shelter in place or stay at home order, for instance non-essential employers subject to Illinois’ Executive Order No. 8, is required to provide PSL. The spirit of the FFCRA indicates yes, but Department of Labor FAQs issued on March 26 call this conclusion into question.)
  - (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 seeking a medical diagnosis.
  - (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

- (5) The employee is caring for a child of such employee if the school or place of care of the child has been closed, or the child care provider of such child is unavailable, due to COVID-19 precautions.
  - (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
- All employees are entitled to PSL, regardless of length of service. However, there must be work available which the employee is unable to perform due to a qualifying reason. Laid off and furloughed employees are not eligible.
  - Employees are entitled to the following amounts of PSL:
    - For full-time employees, up to **80 hours**.
    - For part-time employees, up to the number of hours that the employee works, on average, over a **2-week** period.
    - When needed for reasons #1, #2 and #3 above, sick leave is paid at the employee's **regular rate of pay** and is capped at **\$511 per day** and **\$5,110** in the aggregate.
    - When needed for reasons #4, #5 and #6 above, sick leave is paid at **two-thirds (2/3)** of the employee's regular rate; and is capped at **\$200 per day** and **\$2,000** in the aggregate.
  - Paid sick leave gratuitously provided prior to April 1 does not count as part of the 80 hour entitlement and would be paid in addition to the PSL.
  - PSL does not carry over after the end of the year. If unused, it is not payable on termination of employment.
  - Employers may not require employees to use employer-provided sick time benefits before using PSL. This likely means that PSL must be paid in addition to (but not at the same time as) other paid sick time benefits available to the employee.
  - An employer and an employee may mutually agree to an intermittent leave teleworking schedule due to one of the qualifying reasons for PSL or to an intermittent leave working schedule if an employee needs to care for a child whose school or place of care is closed, or whose care provider is unavailable. However, PSL for any other qualifying reason must be taken in full-day increments, unless an employee is able to telework, and will continue to be taken until the full amount is used or until the employee no longer has a qualifying reason for taking PSL. If the latter, the employee may take any remaining PSL until December 31, 2020 if another qualifying reason occurs.
  - A failure to comply with the law is treated as a violation of the minimum wage requirements of the Fair Labor Standards Act, such that liquidated damages and attorney's

fees are awardable in addition to amounts owed. The law also includes anti-retaliation protections.

***Public Health Emergency Leave (“E-FMLA”) expansion of the Family and Medical Leave Act***

- All public employers and all private employers with fewer than 500 employees (measured at the time an employee’s leave is to be taken) are covered.
- Anyone who has been employed for at least 30 calendar days is entitled to E-FMLA leave, whether full-time or part-time. Laid off and furloughed employees are not eligible.
- An eligible employee can take job-protected E-FMLA leave if he or she is unable to work or telework **only** if the need for leave is due to the need to care for a child under 18 years of age (or a disabled adult) if the school or place of care has been closed or the child care provider is unavailable, due to a public health emergency (defined as “an emergency with respect to COVID-19 declared by a Federal, State, or local authority”).
- The first **ten (10) days** of the E-FMLA leave may be unpaid. The *employee* can choose to substitute accrued vacation leave, personal leave, or other medical or sick leave. Also, an employee who qualifies for E-FMLA leave, due to a school or daycare closure, may use his or her 2 weeks of PSL sick benefits (paid at two-thirds of the employee’s regular rate) for this purpose. The employer may not require the employee to use previously accrued vacation, personal or sick leave time to cover this initial ten (10) day period.
- After the **10 days** of unpaid leave (or paid leave (paid at two-thirds of the employee’s regular rate if PSL is applied to the first 10 days)), employers must pay employees during E-FMLA leave (for the reason listed above) at no less than **two-thirds** of the employee’s regular rate of pay for the number of hours the employee would have been normally scheduled to work. This paid leave is capped at \$200 per day and \$10,000 in the aggregate. An employer can (but does not have to) agree to allow employees to supplement the amount received under the E-FMLA leave, up to normal earnings, with preexisting leave. For example, an employer may permit an employee receiving two-thirds of his or her regular rate to use preexisting paid leave to get the additional one-third.
- E-FMLA is coordinated with traditional FMLA, such that the amount of E-FMLA available to an employee will be reduced by any traditional FMLA used with the employer’s 12-month period, and use of E-FMLA will reduce the 12 weeks of traditional FMLA an employee might otherwise be entitled to.
- An employer and an employee may mutually agree to an intermittent leave schedule for E-FMLA leave due to a need to care for a child whose school or place of care is closed, or an unavailable child care provider.
- As with the existing FMLA, E-FMLA leave is job-protected, meaning the employer must return the employee to the same or equivalent position upon their return to work. There is an exception to this requirement for employers with fewer than 25 employees if the

employee's position does not exist after E-FMLA leave due to an economic downturn or other operating conditions that affect employment caused by a public health emergency during the period of leave (subject to certain conditions, including reasonable attempts to return the employee to an equivalent position, and required efforts to contact a displaced employee for up to a year after they are displaced).

### ***Exemption for Small Businesses***

The Department of Labor (DOL) has clarified when businesses with fewer than 50 employees may claim an exemption from providing certain paid sick leave (PSL) or extended FMLA (E-FMLA) because doing so would "jeopardize the viability of the small business as a going concern".

The DOL now says that at least one of the following 3 criteria must be met to claim the exemption:

1. Providing PSL or E-FMLA 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(s) requesting PSL or E-FMLA 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.
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(s) requesting PSL or E-FMLA, and such labor or services are needed for the small business to operate at a minimal capacity.

Remember that PSL and E-FMLA benefits are available only if there is work available for an employee and the employee requesting leave is has a qualifying need for the PSL or E-FMLA. Individuals who have been laid off or furloughed are not eligible for benefits. Importantly, qualified small business employers are not required to provide PSL or E-FMLA to employees requesting either leave because of a child's school or place of care being closed, or a child care provider being unavailable, due to COVID-19 related reasons; however, PSL for non-childcare related reasons must still be provided.

### ***Exemption of Health Care Providers & Emergency Responder.***

The DOL advises that, for the purposes of employees who may be exempted from PSL and/or E-FMLA, a "health care provider" is:

"... anyone employed at any 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions."

The DOL's definition also includes any individual employed by an entity (such as a staffing company) that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility.

The DOL also advises that, for the purposes of employees who may be exempted from PSL and/or E-FMLA, an "emergency responder" is:

"... an 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. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. ..."

Employers may choose to provide PSL and not E-FMLA to their health care providers or first responders, or may choose to entirely exempt these employees from both benefits. It also appears that exclusions could be handled by job classification or on a case-by-case basis, so long as the employer does not engage in acts that would be prohibited discrimination or retaliation.

### ***Notice Posting***

Covered employers are required to post an FFCRA notice, by posting at the worksite, emailing or direct mailing to current employees, or posting on an employee information internal or external website. The DOL's model notice can be found at:

- [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

### ***Documentation Requirements***

Employers may require an employee requesting PSL or E-FMLA to provide documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. Documentation of school or day care closure could include a notice issued or posted on a government, school, or day care website, or an email from an employee or official of the school, place of care, or child care provider.

Employers that provide PSL or E-FFMLA required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. To claim a tax credit under the FFCRA, the employer should retain appropriate documentation of the need for leave and benefits paid. The IRS may issue forms, instructions, and information for claiming a tax credit, including any needed substantiation to be retained to support the credit. Employers are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

## ***Tax Credits for Emergency Paid Sick Leave and Public Health Emergency Leave.***

The Act provides for a series of tax credits for certain employers providing PSL benefits or paid E-FMLA leave, including tax relief for self-employed individuals. Notably, public employers, including the federal and state governments and political subdivisions, agents, and instrumentalities thereof, are ineligible for the tax credits

### ***PLSA Tax Credits***

Under the Emergency Paid Sick Leave Act, employers are entitled to a refundable credit against employer Social Security and Medicare taxes for up to ten days of each employee's compensation paid under the Emergency Paid Sick Leave Act. The daily tax credit is limited to either \$511 or \$200, depending on the reason the leave was taken, in alignment with the maximum payments under the Emergency Paid Sick Leave Act. Certain payments made by an employer to a group health plan may increase the credit. There are technical provisions to prevent multiple tax benefits from arising out of this credit (i.e., no "double dipping").

In addition, wages paid as a result of the Emergency Paid Sick Leave Act are not included for purposes of determining employer Social Security taxes owed.

### ***PHE Tax Credits***

Employers are entitled to a refundable credit against their Social Security and Medicare taxes for up to \$10,000 of each employee's compensation paid under the Emergency Family and Medical Leave Expansion Act. The daily tax credit is limited to \$200, which again aligns with the maximum payment under the Emergency Family and Medical Leave Expansion Act. This credit may also be increased by certain payments made by an employer to a group health plan, and again there are technical provisions to prevent multiple tax benefits from arising out of this credit. In addition, wages paid as a result of the Emergency Family and Medical Leave Expansion Act are not included for purposes of determining employer Social Security taxes owed.

### ***How the tax credits will work:***

The IRS says employers will be able to recoup this money immediately and that, under further guidance to be announced this or next week, eligible employers will be able to *retain* an amount of their payroll taxes (federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes) equal to the amount of qualifying sick and child care leave that they paid to employees, rather than deposit the payroll taxes with the IRS. If there are insufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this expedited procedure will be announced this or next week.

This means employers will be able to retain taxes for federal, social security and Medicare taxes, rather than pay the taxes to the federal government, in order to pay employees taking paid leave

under the FFCRA effective April 1, 2020. Employers may retain the specified employment taxes for all employees to pay for FFCRA benefits, and not just the taxes for the employees to whom they must provide benefits under the new statute.

### ***Coronavirus Aid, Relief, and Economic Security Act Tax Credits***

Separate and apart from tax credits available under the FFCRA, Section 2301 of the CARES Act, (which became a law on March 27) provides for a one year employee retention tax credit for eligible employers impacted by COVID-19. This allows such employers to take a tax credit against employment taxes equal to 50% of qualified wages for each employee up to \$10,000.00 total per employee. There are 2 categories of employer eligibility: (1) employers who were carrying on trade/business in 2020 and had to fully or partly suspend operations due to government orders limiting commerce, travel, and group meetings because of COVID-19 *or* (2) employers that were able to remain open, but had gross receipts less than 50% of their gross receipts for the same quarter in 2019. In the latter instance, the employer remains eligible until its gross receipts in a given quarter exceed 80% of what they were for the same quarter in 2019.

If an employer has fewer than 100 employees, *all wages* are eligible for the credit, not just wages paid to employees unable to work. Thus, wages paid to employees who continue to work also qualify. Such wages include health plan expenses allocable to the wages. The credit is refundable if it exceeds the employer's liability for payroll taxes.

Importantly, any wages subject to the tax credit for PSL or E-FMLA under the FFCRA may *not* be taken into account in determining qualified wages for this employee retention credit. Additionally, and equally important, if an employer takes out a payroll protection loan under Section 7(a) of the Small Business Act under the CARES ACT, it is *ineligible* for this retention tax credit.

Interestingly, this tax credit applies to wages paid between March 12 and December 31, 2020. This may also impact the credit's interplay with the FFCRA credit and be helpful to employers.