

March 19, 2020
Updated April 22, 2020

Families First Coronavirus Response Act— Employer Takeaways

For Private Employers with Fewer than 500 Employees and Public Agencies, This Emergency Act Expands the Family and Medical Leave Act of 1993 and Enacts an Emergency Paid Sick Leave Act. The Legislation Provides for Certain Payroll Tax Credits to Cover Wages Paid Under These Programs and Certain Qualified Health Plan Expenses.

SUMMARY

Updated April 22, 2020. On March 27, 2020, nine days after its enactment, the Families First Coronavirus Response Act (the “FFCRA”) was amended in part by the [Coronavirus Aid, Relief, and Economic Security Act](#) (the “CARES Act”), the third emergency federal legislation adopted in response to COVID-19. Our memorandum to clients covering how the CARES Act amended the leave and tax provisions of the FFCRA is available [here](#). On April 6, 2020, the Department of Labor’s Wage and Hour Division (the “DOL”) published a temporary rule implementing the leave provisions of the FFCRA, which was amended in part on April 10, 2020 (the “Rule”). Our memorandum to clients covering the Rule is available [here](#). The DOL continues to update and provide additional guidance regarding the leave provisions of the FFCRA in a [Questions and Answers](#) document, and our posts on the DOL’s guidance are available here: [Part I](#), [Part II](#) and [Part III](#).

On March 18, 2020, Congress passed the [Families First Coronavirus Response Act](#) (the “Response Act”), which President Trump [signed](#) into law. While the Response Act addresses an array of concerns regarding Coronavirus (COVID-19), this memorandum focuses on the employment-related aspects of the Response Act, specifically: (1) the Emergency Family and Medical Leave Expansion Act; (2) the Emergency Paid Sick Leave Act; and (3) Tax Credits for Paid Sick and Paid Family and Medical Leave. These provisions

SULLIVAN & CROMWELL LLP

apply only to private employers with fewer than 500 employees and to public agencies and entities with at least one employee, and are scheduled to go into effect not later than 15 calendar days after enactment and to expire on December 31, 2020.

BACKGROUND

The House originally passed the Response Act in the early morning hours of Saturday, March 14, 2020, by a vote of 363 to 40. The Response Act was later significantly amended through so-called “technical corrections.” Among other modifications, the version of the Response Act ultimately sent to the Senate added daily and aggregate caps to the paid leave a covered employer is required to pay to an eligible employee and significantly narrowed the bases for which an employee is eligible for leave.

The Senate passed the Response Act on March 18, 2020 by a vote of 90-8. Although Senate Majority Leader Mitch McConnell has described the Response Act as “a well-intentioned, bipartisan product,” he has argued that it has “real shortcomings” in terms of providing help only to a “subset of workers” and “does not even begin to cover all of the Americans who will need help in the days ahead.” Congress is expected to pass additional legislation in response to the COVID-19 pandemic, likely including additional economic stimulus measures.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

The Response Act includes the Emergency Family and Medical Leave Expansion Act (“Expansion Act”), which amends the Family and Medical Leave Act of 1993 (“FMLA”). Under the Expansion Act, an employer with fewer than 500 employees is required to provide family leave under certain circumstances to an employee who has been employed for at least 30 calendar days (an “eligible employee”).

A covered employer is required to provide an eligible employee up to 12 weeks of leave if the employee is unable to work or telework because of a need to care for a son or daughter under 18 years of age due to school closures or unavailability of child care providers because of a public health emergency. A public health emergency is defined as “an emergency with respect to COVID-19 declared by a Federal, State or local authority.”

- **First 10 Days – Unpaid Family Leave.** The first 10 days of an employee’s leave are permitted to be **unpaid** leave. Employees may choose to substitute “any accrued vacation leave, personal leave, or medical or sick leave” in lieu of unpaid leave, but employers may not require employees to do so. Employers may choose to pay employees during the first 10 days of leave.
- **After Initial 10 Days – Paid Family Leave.** After the initial 10 days of leave, employers must provide **paid** leave to eligible employees, up to 12 weeks of total leave. Paid leave must not be less than two-thirds of the employee’s regular rate of pay, and should be based upon the number of hours the employee would normally work. In cases where employees’ schedules vary, pay must be based upon the average number of hours that the employee was scheduled to work per day over the previous 6-month period, including hours for which the employee took any type of leave. If the employee did not work during that period, the employee must be paid in accordance with “the

SULLIVAN & CROMWELL LLP

reasonable expectation of the employee at the time of hiring of the average number of hours per day that employee would normally be scheduled to work.”

- **Pay Caps.** Paid family leave is capped per employee at \$200 per day and \$10,000 in aggregate.

Job Protections. Subject to limited exceptions, upon return from leave, eligible employees shall “be restored by the employer to the position of employment held by the employee when the leave commenced” or “be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.” Employers who employ fewer than 25 employees, however, are not required to comply with those protections if:

- The employee takes COVID-19 leave;
- The employee’s position does not exist due to changes in operating conditions of the employer that (1) affect employment and (2) are caused by a public health emergency during the period of leave;
- The employer makes reasonable efforts to restore the employee to an equivalent position; and
- If reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for one year from the earlier of (1) the date on which the qualifying need related public health emergency concludes; or (2) the date that is 12 weeks after the date on which the employee’s COVID-19 leave begins.

Collective Bargaining Agreements. Employers should be aware that the Expansion Act applies to employees who work under a multiemployer collective bargaining agreement (“CBA”) and whose employers pay into a multiemployer plan. An employer subject to a multiemployer CBA may, consistent with its bargaining obligations and the applicable CBA, satisfy its obligations to provide leave under the Expansion Act by making contributions to multiemployer funds, provided the multiemployer funds are in compliance with FMLA.

Employers May Exclude Health Care Providers. Employers with employees who are “health care provider[s]” or “emergency responder[s]” may choose to exclude such employees from the Expansion Act.

Regulations. The Expansion Act grants the Secretary of Labor the authority to issue regulations for good cause, and without public comment or the customary 30-day pre-effective publication period, to (1) “exclude certain care providers and emergency responders from the definition of eligible employee,” and (2) “exempt small businesses with fewer than 50 employees from the requirements” of the Expansion Act “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

EMERGENCY PAID SICK LEAVE ACT

The Response Act also includes the Emergency Paid Sick Leave Act (“Sick Leave Act”)—the first ever federal paid sick time mandate. The Sick Leave Act requires employers with fewer than 500 employees to provide employees with paid sick leave under various circumstances related to COVID-19. In all circumstances, employers will be required to pay employees paid sick leave regardless of how long the

SULLIVAN & CROMWELL LLP

employee has been employed by the employer. Full-time employees are entitled to 80 hours (two weeks) of paid sick leave wages and part-time employees are entitled to paid sick leave wages for the average number of hours that they work over a two-week period.

- **Employee Sick Leave.** Employers must provide paid sick leave at the employee's regular rate of pay¹ for employees who are unable to work or telework because of a need for leave due to (1) "a Federal, State, or local quarantine or isolation order related to COVID-19," (2) complying with advice by a healthcare provider to self-quarantine "due to concerns related to COVID-19," or (3) "experiencing symptoms of COVID-19 and seeking a medical diagnosis."
- **Pay Caps.** Employee sick leave is capped per employee at \$511 per day and \$5,110 in aggregate.
- **Employee Leave to Care for Family Member.** Employers will be required to pay employees paid sick leave paid at two-thirds of the employee's regular rate for employees who are unable to work or telework because of a need for leave due to (1) caring for a family member who is subject to a quarantine or isolation order related to COVID-19 or complying with a healthcare provider's advice to self-quarantine due to COVID-19, (2) caring for a son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19, or (3) 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."
- **Pay Caps.** Employee leave to care for a family member or child is capped per employee at \$200 per day and \$2,000 in aggregate.

Termination of Leave. Paid sick leave ends beginning with an employee's next scheduled workshift after termination of the employee's need for paid sick time. In other words, if the reason for an employee's paid sick time ends on the fifth day of leave, the employee is entitled to five days of paid sick leave, not two weeks.

Collective Bargaining Agreements. This section of the Sick Leave Act also applies to employees who work under a multiemployer CBA and whose employers pay into a multiemployer plan. The Sick Leave Act provides that employers subject to multiemployer CBAs are permitted to satisfy their paid sick leave obligations by making contributions to multiemployer funds, provided the multiemployer funds comply with all requirements of the Sick Leave Act.

Interaction with Existing Leave Policies. An employee may first use the paid sick time provided under the Sick Leave Act, and employers may not require an employee to first use other paid leave provided by the employer. In addition, employers may not require an employee to find a replacement employee to cover the hours during which the employee is using paid sick time. Paid sick time required under the Sick Leave Act will not carry over to the next year.

Posting Notice. The Sick Leave Act also requires employers to post notice of its requirements, and a model notice will be made available by the Secretary of Labor. There is also a whistleblower provision that

¹ If the federal minimum wage or the applicable state or local minimum wage is greater than the employee's regular rate of pay, the employee's required compensation is the greater amount.

SULLIVAN & CROMWELL LLP

prohibits employers from discharging, disciplining, or discriminating against employees who take leave under the Sick Leave Act or who file a complaint under or related to the Sick Leave Act.

Failure to Comply. Employers who fail to provide paid sick time as required by the Sick Leave Act will be considered to have failed to pay minimum wages in violation of Section 6 of the Fair Labor Standards Act of 1938 (the “FLSA”) and will be subject to penalties under the FLSA. Employers who willfully violate the whistleblower provisions of the Sick Leave Act will be considered to violate Section 15(a)(3) of the FLSA and will be subject to penalties under the FLSA.

Employers May Exclude Health Care Providers. Employers with employees who are “health care provider[s]” or “emergency responder[s]” may choose to exclude such employees from the Sick Leave Act.

Regulations. The Sick Leave Act grants the Secretary of Labor the authority to issue regulations for good cause, and without public comment or the customary 30-day pre-effective publication period, to (1) exclude healthcare providers and first responders from the Sick Leave Act, including by allowing their employers to opt out, (2) “exempt small businesses with fewer than 50 employees from the requirements” of the Sick Leave Act “when the imposition of such requirements would jeopardize the viability of the business as a going concern,” and (3) carry out the purposes of the Sick Leave Act, as necessary.

TAX CREDITS FOR PAID SICK AND PAID FAMILY AND MEDICAL LEAVE

The Response Act provides for tax credits against payroll taxes for certain amounts of qualified family leave and sick leave wages required to be paid under the Response Act.

Tax Credits for Paid Family Leave. With respect to the Expansion Act, employers are eligible for a tax credit against the payroll tax for each calendar quarter, equal to 100 percent of qualified family leave wages paid by the employer that calendar quarter. The Response Act caps the amount of qualified family leave wages eligible for the tax credit at \$200 per day and \$10,000 aggregate for all calendar quarters for any employee paid qualified family leave wages under the Response Act.

Tax Credits for Paid Sick Leave. With respect to the Sick Leave Act, employers are eligible for a tax credit against the payroll tax for each calendar quarter, equal to 100 percent of qualified sick leave wages paid by the employer that calendar quarter. The caps on the amount of qualified sick leave wages eligible for tax credit are different depending on the reasons for which the employee takes sick leave.

- **Cap on Qualified Employee Sick Leave.** The amount of qualified sick leave wages eligible for a tax credit is capped at \$511 for any day an employee is paid sick leave wages because the employee is unable to work or telework because of a need for leave due to (1) “a Federal, State, or local quarantine or isolation order related to COVID-19,” (2) complying with advice by a healthcare provider to self-quarantine “due to concerns related to COVID-19,” or (3) “experiencing symptoms of COVID-19 and seeking a medical diagnosis.”

SULLIVAN & CROMWELL LLP

- **Cap on Qualified Employee Leave to Care for Family Member.** The amount of qualified sick leave wages eligible for a tax credit is capped at \$200 for any day an employee is paid sick leave wages because the employee is unable to work or telework because of a need for leave due to (1) caring for a family member who is subject to a quarantine or isolation order related to COVID-19 or complying with a healthcare provider’s advice to self-quarantine due to COVID-19, (2) caring for a son or daughter whose school is closed or child care provider is unavailable due to COVID-19, or (3) 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.”
- **Aggregate Cap.** The Response Act provides that the aggregate number of days taken into account per calendar quarter may not exceed 10 over the aggregate number of days taken into account for all preceding calendar quarters.

Qualified Health Plan Expenses. The tax credit allowed to an employer under the Response Act is increased by the employer’s qualified health plan expenses that are “properly allocable” to the paid family leave or sick leave wages for which the tax credit is allowed.

Limits and Refunds. The tax credit allowed to an employer under the Response Act each calendar quarter is limited to the payroll taxes imposed on the wages paid to all employees that calendar quarter. If the amount of the tax credit is greater than the payroll taxes on the wages paid to all employees for any calendar quarter, the excess will be treated as an overpayment and refunded. To prevent double benefits, the employer’s gross income for the taxable year will be increased by the amount of any tax credit allowed under the Response Act.

Opt-Out. An employer may opt out of the provisions of the Response Act regarding tax credits.

Effective Time Period. The tax credits will be available within 15 days of enactment and ending on December 31, 2020.

* * *

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Jeannette E. Bander	+1-212-558-4288	banderj@sullcrom.com
Heather L. Coleman	+1-212-558-4600	colemanh@sullcrom.com
Matthew M. Friestedt	+1-212-558-3370	friestedtm@sullcrom.com
Joseph A. Hearn	+1-212-558-4457	hearnj@sullcrom.com
Tracy Richelle High	+1-212-558-4728	hight@sullcrom.com
Jeffrey D. Hochberg	+1-212-558-3266	hochbergj@sullcrom.com
Ann-Elizabeth Ostrager	+1-212-558-7357	ostragerae@sullcrom.com
Robert W. Reeder III	+1-212-558-3755	reederr@sullcrom.com
Theodore O. Rogers Jr.	+1-212-558-3467	rogersto@sullcrom.com
David C. Spitzer	+1-212-558-4376	spitzerd@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com

Washington, D.C.

Julia M. Jordan	+1-202-956-7535	jordanjm@sullcrom.com
-----------------	-----------------	--
