

FARRIS BOBANGO
ATTORNEYS AT LAW

999 S. Shady Grove Road, Suite 500
Memphis, Tennessee 38120
Telephone 901.259.7100 Fax 901.259.7150
www.farrisbobango.com

Richard D. Bennett

rbennett@farris-law.com

March 23, 2020

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“FFCRA”) into law, effective within 15 days—April 2, 2020. Although the FFCRA is still a work in process with additional changes proposed, I have summarized below the Act as it currently stands to help you navigate through these complicated waters. If you have additional questions, please reach out to us.

Expands the Family and Medical Leave Act for a “Public Health Emergency”

The FFCRA expressly amends the Family and Medical Leave Act with specific changes related to the coronavirus pandemic.

- **Effective Date and Expiration:** This program will become effective on **April 2, 2020**, and remain in effect until **December 31, 2020**.
- **Expanded Coverage and Eligibility:** The Act significantly amends and expands the FMLA temporarily. The current employee threshold for FMLA coverage would change from only covering employers with 50 or more employees to instead covering all employers with fewer than 500 employees. It also lowers the eligibility requirement in that any employee who worked for the employer for at least 30 days (instead of 12 months) before the designated leave may be eligible to receive paid family and medical leave.
- **Exemptions:** The Act includes language that excludes healthcare providers and emergency responders from the definition of employees who may take this new leave. The term healthcare provider has not yet been defined and we are anticipating rules and regulations from the HHS Secretary.
- **Small Employers:** Private employers with fewer than 50 employees may seek an exemption of this provision from the Secretary of Labor for good cause when providing the leave required of this Act would jeopardize the viability of their business.

- **Reasons for “Emergency Leave”:** Until December 31, 2020, public employers and private employers with fewer than 500 employees, who have been on the job for at least 30 days have the right to take up to 12 weeks of job-protected leave for a “Public Health Emergency,” which essentially means an inability to work due to the need to care for the employee’s child (under 18 years of age) if their school has been closed or their child care provider is unavailable due to COVID-19.
- **Paid Leave:** The first ten days of “Emergency Leave” may be unpaid. During this period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the ten-day unpaid period. After the ten days, the employer generally must pay full-time employees at two-thirds the employee’s regular rate for the number of hours the employee would otherwise be normally scheduled to work. The Act limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.
- **Calculating Pay for Part-Time Employees:** Employees who work a part-time or irregular schedule are entitled to pay based on the average number of hours the employee worked for the six months before taking Emergency Leave. Employees who have worked for less than six months prior to leave are entitled to pay based on the employee’s reasonable expectation at the time of hiring of the average number of hours the employee would usually be scheduled to work.
- **Job Restoration:** Generally, an employee taking Emergency Leave must be returned to his/her same or equivalent position following leave. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee’s position no longer exists following the Emergency Leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency Leave. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee’s leave.

The Emergency Paid Sick Leave Act

The FFCRA also contains another provision that provides that public and private employers with fewer than 500 employees must provide up to 80 hours of emergency paid sick leave to full-time employees – and two-weeks leave to part-time employees based on average hours worked. Employees are eligible for this paid leave, regardless of how long they have been employed.

- **Effective Date and Expiration:** This program will become effective on **April 2, 2020**, and there is no expiration date.
- **Reasons for Paid Sick Leave:** The Act allows an eligible employee to take paid sick leave because the employee is:

1. subject to a federal, state or local quarantine or isolation order related to COVID-19;
 2. advised by a health care provider to self-quarantine due to COVID-19 concerns;
 3. experiencing COVID-19 symptoms and seeking medical diagnosis;
 4. caring for an individual (note – not just family members) subject to a federal, state or local quarantine or isolation order, or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 5. caring for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to public health emergency; or
 6. 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.
- **Eligibility:** Employers with fewer than 500 employees must provide full-time employees (regardless of the employee’s duration of employment prior to leave) with 80 hours of paid sick leave at the employee’s regular rate (or two-thirds the employee’s regular rate to care for qualifying reasons 4, 5, or 6 listed above).
 - **Exemption:** The Act provides an exception for employers who are healthcare providers or emergency responders.
 - **Cap on Paid Sick Leave Wages:** The Act places limits on paid sick leave. Specifically, paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and up to \$200 per day up to \$2,000 total to care for others and any other substantially similar condition.
 - **Vacation/PTO:** Employers may not require employees to use vacation, PTO or other forms of paid leave before using emergency paid sick leave.
 - **Furloughed or Laid Off Employees:** An argument can be advanced that if an employer places its employees on furlough or lay off prior to the FFCRA’s effective date (April 2), then they would not be eligible for leave under this provision; however, the express language of the Act is unclear on that topic. At minimum, employers should take care not to base lay off or furlough decisions on which employees are likely to need leave—or risk claims for retaliation/interference. A furlough occurs when a company puts some or all of its employees on a temporary, unpaid leave in response to a business circumstance or economic hardship. Furloughs may be voluntary or mandatory. Employees stay on the payroll, but they do not receive wages and are not permitted to perform any work. A layoff is a separation of the employee from the payroll. Usually, companies expect to recall and rehire employees from a layoff when economic or other circumstances allow. Generally, both furloughed and laid-off employees are eligible for unemployment benefits. The rationale is that eligibility for unemployment benefits in most states is triggered by an employee’s lack of work through no fault of the employee’s, not an

employee's formal separation of employment. The federal Families First Coronavirus Response Act required states to "ease" eligibility requirements to allow employees who have been affected by COVID-19, including those who have been laid off, furloughed or had their hours cut, to more easily receive unemployment benefits.

- **Carryover and Interaction with Other Paid Leave:** This paid sick leave will not carry over to the following year and may be in addition to any paid sick leave currently provided by employers.
- **Calculating Rate of Pay:** Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months before taking paid sick leave. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period. A business employing fewer than 500 employees is required, at the request of the employee, to pay a full-time employee for 80 hours of mandated emergency paid sick leave instead of the initial ten days of unpaid leave permitted by the Emergency Family and Medical Leave Expansion Act (summarized above).
- **Posting:** Employers must post the notices of this Act in a conspicuous place. Model notices will be provided by the Secretary of Labor.
- **No Retaliation:** Employers may not retaliate against, discharge, or discipline employees because the employee took leave under this provision. This No Retaliation provision would not preclude an employer from making a company-wide layoff decision based on economic reasons. However, if the employer targeted for layoff only those employees who are eligible for leave under the Act or who have requested leave, then it would probably run afoul of this provision.
- **Continuing Insurance Benefits:** Employees who are laid off generally are no longer eligible to participate in their employer's health benefit plan. After a layoff, former employees with benefits provided by a COBRA-covered employee are eligible for COBRA continuation coverage. An employer may choose, but is not required, to cover some or all of the cost of COBRA benefits to its laid-off employees. Employers should provide standard COBRA election notices and otherwise follow their standard COBRA procedures for separated employees at the time of the layoff. Employees placed on leave by the employer due to a quarantine order or taking Emergency Leave should have their health insurance continued during the term of the leave.

Tax Credits for Emergency Paid Sick Leave and Paid Family Leave

Many small-business owners are worried about how to pay for these benefits, especially at a time when business across numerous industries has basically come to a halt. The bill provides payroll

tax credits to later recoup payments made for emergency paid sick leave and paid family leave. The credit is applied to the tax the company or nonprofit normally pays for each employee's Social Security (This is the 6.2 percent tax employers pay on each employee's salary). If sick leave or family and medical leave ends up costing more than the Social Security bill, the U.S. government will send the employer a check to cover the remaining costs. How this will be determined is up to the Treasury and the Internal Revenue Service.

Unemployment Insurance

Additional funding is provided to states for processing and paying unemployment insurance benefits. A second bill is still being debated in Washington that is designed to provide additional funding of unemployment insurance.

Any payments made by an employer to an employee while unemployed "currently" reduce the amount of unemployment an employee can receive. For example, if an employee is terminated and receives two weeks pay as severance, then the employee is not eligible for unemployment for two weeks to prevent double dipping.

Insurance Coverage for COVID-19 Testing

The Act requires private health plans (including insured, self-insured, and grandfathered) to provide coverage for COVID-19 diagnostic testing and related services to employees and their covered dependents, without cost sharing (like deductibles, copayments, and coinsurance) from the enactment of the Act through the end of the national emergency period.

Covered services and related cost waivers apply to diagnostic testing, healthcare provider services (in-person and telehealth), and facility costs (physician office, urgent care center, and emergency room) to the extent the costs are related to evaluating the need for, or furnishing, COVID-19 diagnosis and treatment. Besides coverage and cost waiver provisions, plans shall not require prior authorization or similar medical management requirements as a precondition of COVID-19 testing or services.