

# EMPLOYMENT LAW UPDATE REGARDING THE FFCRA & THE CARES ACT

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# PRESENTERS



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# TODAY'S PRESENTATION

- Families First Coronavirus Response Act (“FFCRA”)
  - Emergency Paid Sick Leave Act
  - Emergency FMLA Expansion Act
- CARES Act
  - Paycheck Protection Program
  - Retention Tax Credit/Deferral



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT

# FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”)

- The FFCRA requires employers with fewer than 500 employees to provide their employees with certain leave benefits for specified reasons related to COVID-19.
- Two distinct provisions under the FFCRA.
  - Emergency Paid Sick Leave Act.
  - Emergency Family and Medical Leave Expansion Act.
- Signed into law March 18, 2020, effective April 1, 2020 until December 31, 2020.
  - Not applied retroactively.
- Department of Labor (“DOL”) has only just recently issued formal guidance, with daily FAQs and informal guidance being modified regularly.

# EMERGENCY PAID SICK LEAVE ACT

- Provides up two weeks (80 hours) of paid sick time to qualifying employees who are unable to work or telework.
- An employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:
  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 related to COVID-19;
  3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
  4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
  5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
  6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
- Variable statutory payment caps in play based upon the employees qualifying reason for paid sick leave.

# EMERGENCY PAID SICK LEAVE ACT

- Variable statutory payment caps in play based upon the qualifying reason for paid sick leave.
- **If employee is taking leave because they are:**
  - (1) 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 related to COVID-19;
  - (3) experiencing COVID-19 symptoms and is seeking a medical diagnosis.
- **Then employee taking leave shall**
  - be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

# EMERGENCY PAID SICK LEAVE ACT

- Variable statutory payment caps in play based upon the qualifying reason for paid sick leave.
- **If employee is taking leave because they are:**
  - (4) caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
  - (6) experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
- **Then employee taking leave shall**
  - be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).



# EMERGENCY PAID SICK LEAVE ACT

- Variable statutory payment caps in play based upon the qualifying reason for paid sick leave.
- **If employee is taking leave because they are:**
  - (5) caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.
- **Then employee taking leave shall**
  - be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).
- The likely only overlap between the paid sick leave portion and the expanded family medical leave portion occurs with child care.

# EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- Amends and expands existing FMLA.
- Applies to employers with less than 500 employees.
  - i.e., covers employers with less than 50 employees.
  - Employers with less than 50 employees may be exempt.
  - Employees need only 30 calendar days of employment.
- Expanded coverage is limited to a specific coronavirus reason: leave to care for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

# EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- Provides up to 10 weeks (potentially 12) of paid leave to care for a child.
- First two weeks of expanded family medical leave are unpaid, unless used in conjunction with paid sick leave or with some other type of leave provided by the employer.
- Next 10 weeks of expanded family medical leave are paid at 2/3 of employee's salary, but:
  - Max of \$200 a day.
  - Max of \$10,000 aggregate (but can get another \$2,000 under paid leave Act).

# EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- The Act does not extend the total FMLA leave available; i.e., the 12 weeks
- Usual job protection of regular FMLA
- However, job restoration does not apply to Er with <25 Ee's if:
  - Position no longer exists
  - Er makes reasonable efforts to provide equivalent position
  - Er continues to make reasonable efforts for one year to provide equivalent position

# EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- Key exclusions:
  - Health Care Provider
  - Emergency Responder
- DOL's Final Rule broadened exclusions
- Employers can elect to exclude such workers from paid sick leave and/or EFMLA
- Exclusions can be handled by job classification or on a case-by-case basis, so long as the employer does not engage in prohibited acts that would be considered discriminatory or retaliatory

# Q&A

# QUESTION RE PAID SICK LEAVE

What if an employee was laid off before April 1, but is now applying for leave, do I have to provide them with paid sick leave?

# QUESTION RE EMERGENCY FMLA

Schools and daycares have been closed since March, although many people have their kids with parents, other family members, neighbors etc. Now when April 1st arrive, everyone all of a sudden has to be off to take care of their kids. Just wondering how much I can ask without violating their right to take FMLA.



# QUESTION RE PAID SICK LEAVE

When someone requests emergency paid sick leave, should I discuss expanded family medical leave with them?

# QUESTION RE EMERGENCY FMLA

How does the Emergency FMLA work if an employee has already taken some FMLA time off?

# QUESTION RE PAID SICK LEAVE

Can an employee get numerous paid sick leaves for qualifying reasons? As in two weeks for being quarantined, two weeks for taking care of child?

# QUESTION RE EMERGENCY FMLA

What is a “place of care” and who is a “child care provider”?

# QUESTION RE PAID SICK LEAVE

How do I calculate a part time employees paid sick leave?  
What if a part time employee does not work 80 hours typically?

# QUESTION RE EMERGENCY FMLA

Can one of my employees take Emergency FMLA if his or her spouse is out of work and available to watch their children who are out of school?

# QUESTION RE PAID SICK LEAVE

What does it mean to be subject to an isolation order?

# QUESTION RE EMERGENCY FMLA

If a school is closed but the students are being tele-taught via online classes, is an employee eligible to take off work to care for his or her child?





# CARES ACT – PAYCHECK PROTECTION PROGRAM

# CARES ACT – PAYCHECK PROTECTION PROGRAM

- The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), signed into law on Friday March 27, 2020, introduced the Paycheck Protection Program (the “PPP”) with an initial \$349 billion in funding and the goal of preventing job loss and small businesses failure due to losses caused by COVID-19.
- On April 24, 2020, the PPP and Health Care Enhancement Act added \$310 billion of funding for loans to be made under the PPP.
  - \$60 billion of which is set aside for PPP loans from small banks, community financial institutions, and credit unions.

# CARES ACT – PAYCHECK PROTECTION PROGRAM

- Authorizes loans of up to \$10M to be used on payroll, benefits, rent and other costs from February 15, 2020 through June 30, 2020.
- Loan may be forgiven, but forgiveness is subject to reduction if staffing and salary levels were/are reduced and not restored.
- Formula for determining the size of the loan is tied to payroll costs of the particular business.
  - $2 \frac{1}{2}$  x the applicant's average total monthly payroll costs during the one year preceding the date of the PPP Loan.

# CARES ACT – PAYCHECK PROTECTION PROGRAM

- As part of the application process, borrowers must certify in good faith that:
  - The PPP Loan request is necessary to support the ongoing operations of the business as a result of current economic conditions.
  - The PPP Loan funds will be used to retain workers and maintain payroll, or make mortgage payments, lease payments and utility payments.
  - The applicant does not have multiple PPP Loan applications, and has not otherwise received funds under a PPP Loan, for the same purpose or for duplicative amounts.

# CARES ACT – PAYCHECK PROTECTION PROGRAM

- Eligible for forgiveness in an amount up to the sum of certain qualified costs incurred and payments made during the eight-week period beginning on the date the PPP Loan is issued. These qualified costs and expenses are as follows:
  - Payroll costs (as defined above), including any additional wages paid to tipped employees.
  - Any payment of interest on any mortgage debt originally incurred prior to February 15, 2020.
  - Any payment of rent obligations under a lease agreement in force prior to February 15, 2020.
  - Any payment for utility services which were in place prior to February 15, 2020 (including electricity, gas, water, transportation, telephone or internet access).

# CARES ACT – PAYCHECK PROTECTION PROGRAM

- All qualified costs and expenses must be adequately documented and the maximum forgiveness amount cannot exceed the principal borrowed.
- The amount of PPP Loan forgiveness will be reduced by factors that take into account any reduction in number of employees or any material reductions (>25%) in salary and wages paid to employees otherwise earning less than \$100,000 per year when compared to a prior unaffected period (Q1 2020).

# Q&A

# QUESTION RE: PPP

What happens if my business has already laid off workers or significantly reduced salaries?



# QUESTION RE: PPP

How do I know if we have “materially reduced” an employee’s salary and risk losing some loan forgiveness?

# QUESTION RE: PPP

Can we accelerate payments that would otherwise be due later and pay them within the eight-week period after the loan is funded in order to qualify for forgiveness?

# QUESTION RE: PPP

How will the timing of payments work for expenses incurred but paid after the eight-week period?

What about expenses incurred before but paid during the eight-week period?



# CARES ACT: PAYROLL TAX INCENTIVES



# CARES ACT: PAYROLL TAX INCENTIVES

- Two tax incentive programs:
  - Employee Retention Credit.
    - \$5k refundable payroll tax credit for certain employers that retain employees.
  - Employer Payroll Tax Deferrals.
    - Deferral of an unlimited amount of employer social security taxes to the end of 2021 and 2022.

# CARES ACT: EMPLOYEE RETENTION CREDIT

- Credit available to eligible entities and is equal to 50% of up to \$10,000 of qualified wages paid after March 12, 2020 through December 31, 2020.
- Eligible entities are either:
  - Carrying on a trade or business during 2020; or
  - A section 501(c) organization; AND
    - (1) its operations are fully or partially suspended as a result of a gov't order that imposes limitations upon travel, commerce, or group meetings due to COVID-19; or
    - (2) (for businesses) there is a greater than 50% reduction in gross receipts for a quarter compared to 2019.

# CARES ACT: EMPLOYEE RETENTION CREDIT

- Amount of Credit
  - Determined on a per-employee basis.
  - Equal to 50% of “qualified wages”.
    - Wages subject to FICA tax as well as costs for ER-provided health insurance.
    - Must be paid after March 12, 2020 through December 21, 2020.
  - Employers > 100 employees.
    - Only include wages being paid to employees that are not performing services.
  - Employers < 100 employees.
    - Qualified wages include *all wages paid to all employees* during any quarter employer is an eligible employer (during time frame).

# CARES ACT: EMPLOYEE RETENTION CREDIT

- Credit Cash Flow
  - Credit = refundable payroll tax credit.
  - ER is permitted to retain payroll taxes and withholdings up to the amount of the credit to take advantage contemporaneously with when wages are paid.
  - ER is permitted to retain any amounts that would otherwise be due to the federal government (EE/ER share of social security taxes, EE/ER share of Medicare taxes, and employee Federal income tax withholdings).
  - If not enough withholdings to cover the full amount of the credit, the ER can: (1) request a cash refund with quarterly payroll tax return; or (2) file Form 7200 to obtain an advance refund for the credit.



# CARES ACT: EMPLOYER PAYROLL TAX DEFERRAL

- Almost all employers are eligible to defer the 6.2% FICA portion of the employer's employment taxes for any payroll paid on March 27, 2020 through March 31, 2020.
- Allows employers to pay 50% of the deferred amount on 12/31/2021 and remaining 50% on 12/31/2022.
- Employers who receive loan forgiveness under the PPP or Section 1109 of the CARES Act are not eligible for the deferral of payroll taxes.

LET'S HEAR FROM YOU!

# AUDIENCE Q&A