

# Families First Coronavirus Response Act & What Might Come Next

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# Family & Medical Leave Act

The Family & Medical Leave Act (“FMLA”) requires employers with 50 or more employees, upon request of the employee, to provide leave to employees who have worked 1250 hours over a 12-month period, if the employee satisfies one of the following qualifying events:

- (1) the birth of a child
- (2) to care for a child placed with the employee for adoption or foster care
- (3) to care for an immediate family member who has a serious health condition
- (4) the employee has a serious health condition which causes him/her to be unable to perform the job
- (5) the employee or a member of his/her family will be or has been deployed by the military

The leave is typically unpaid.

# Family First Coronavirus Relief Act

- ◇ Amends FMLA
- ◇ Employees are eligible for additional leave (typically, two weeks) at either their regular rate of pay if they are quarantined (usually upon advice of a medical provider), or if they are experiencing Covid-19 symptoms and seeking a medical diagnosis
- ◇ Employees also eligible for additional sick or family medical leave (again, typically two weeks) at 2/3rds rate of regular pay to take care of a family member who has Covid-19, or to take care of a child whose school or day care provider is closed due to the pandemic
- ◇ Employees also may be eligible up to 10 additional weeks of paid leave at 2/3rds rate in school or day care closure circumstances
- ◇ Does not apply to employees seeking to avoid COVID-19 exposure

# Employer/Employee Coverage & Eligibility Requirements Specific to FFCRA

- ◆ Covered employers include certain public employers and private employers with fewer than 500 employees
- ◆ All employees (not just employees who have worked minimum qualifying hours under FMLA) are entitled to paid leave for specified reasons related to Covid
- ◆ Only employees who have been employed for at least 30 days are entitled to up to additional 10 weeks of paid leave in school or day care closure circumstances
- ◆ Only effective through December 31, 2020

# Employer Tax Credits Under FFCRA

- ◇ A covered employer may take a tax credit for leave paid under FFCRA if it maintains and provides to the IRS necessary documentation supporting the claimed credit
- ◇ Such records must include documentation demonstrating how the employer determined the amount of –
  - ◇ the paid leave to employee(s) under FFCRA
  - ◇ qualified health plan expenses that it allocated to wages
- ◇ Such records must also include certain IRS forms, including Forms 7200 and 941

# FFCRA “Small Business” Exemptions

- ◇ If an employer has less than 50 employees, it may claim an exemption related only to the school or day care closure circumstances under FFCRA if its “authorized officer” determines that the employer meets any of the following criteria --
  - ◇ Failure to Break Even or Closure Exemption – The absence of the employee(s) would result in the employer not being able to cover current expenses and financial obligations with current revenues or operate at minimal capacity
  - ◇ Specialized or Key Employee Exemption -- The absence of the employee(s) would entail a substantial risk to the financial health or operational capabilities of the employer because of the employee(s) specialized skills, knowledge of the business, or responsibilities
  - ◇ Lack of Replacement(s) Exemption – the absence of the employee(s) would cause the employer to close down because of the lack of replacement workers available
- ◇ Employer need not report taking exemption to any agency; need only document decision

# What Happens Next?

- ◇ H.R. 6800 - The Health and Economic Recovery Omnibus Emergency Solutions Act (Heroes Act)
  - ◇ \$3.4 trillion coronavirus relief package
  - ◇ House introduced 5/12/2020
  - ◇ House passed 5/15/2020
  - ◇ Last hearing held in Senate on 7/23/2020
- ◇ H.R. 8406 – [Updated, slightly scaled down, version of] the Heroes Act
  - ◇ \$2.2 trillion coronavirus relief package
  - ◇ House introduced 9/28/2020
  - ◇ House passed 10/1/2020

# The Heroes Act\*\*

- ◇ Employee Eligibility and Employer Clarification
  - ◇ Suspends until 12/31/22 current 1250-hour eligibility requirement and reduced tenure eligibility requirement from 12 months to 90 days under non-emergency FMLA
  - ◇ Addresses inability to qualify for FMLA due to rampant unemployment and furloughs
- ◇ Extends EFMLEA benefits from 12/31/2020 to 2/28/21

\*\*<https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/Updated%20Heroes%20Act%20Summary.pdf>

# The Heroes Act\*\*

- ◇ Updated Emergency Leave Definitions.
  - ◇ Provides private sector and public sector employees who have been on the job for at least 30 calendar days with the right take up to 12 weeks of job-protected paid leave under the Family and Medical Leave Act, regardless of the size of their employer.
  - ◇ Employees can take this leave to:
    - ◇ self-isolate because they were diagnosed with COVID-19
    - ◇ obtain a medical diagnosis or to care for symptoms of COVID-19
    - ◇ comply with a recommendation or order to self-isolate because physical presence at work would jeopardize the health of the employee, other employees, or a person in the employee's household
    - ◇ care for a family member who is self-isolating
    - ◇ care for a child whose school has closed or child care provider is unavailable due to COVID-19
    - ◇ care for a family member who is individual with a disability or senior citizen whose place of care or direct care provider is unavailable

# The Heroes Act\*\*

- ◆ Removes the Secretary of Labor's authority to issue regulations, authorized under FFCRA, to exempt employees of businesses with fewer than 50 employees, or to issue regulations to exempt health care providers and emergency responders from the right to paid leave. Any regulations that have been issued under that previous authority shall have no effect.
- ◆ Eliminates prior FFCRA provisions that allow employers of health care providers and emergency responders the ability to exclude their employees from emergency FMLA leave

# The Heroes Act\*\*

## Emergency Family and Medical Leave Expansion Act Amendments

- ◇ Employees provided with full 12 weeks of paid emergency FMLA leave, which does not count towards employee's 12 weeks of non-emergency unpaid FMLA leave
- ◇ Wage rate preserved (no less than 2/3rds usual pay, up to \$200 per day)
- ◇ Intermittent leave or reduced work schedule allowed
- ◇ Eliminates prior FFCRA provisions that restrict employees from exercising private right of action against employers, with fewer than 50 employees
- ◇ Employers may require basic documentation to support request for emergency leave, but not before five weeks after the employee has started leave
- ◇ Ensures employees receive emergency paid sick leave in addition to any existing employer-provided paid leave

# The Heroes Act\*\*

## Emergency Paid Sick Leave Act Amendments

- ◇ Eligible employees can use paid sick leave
- ◇ Two workweeks (80 hours) of emergency paid sick leave
- ◇ No proposed change for rate of pay:
  - ◇ full rate of pay up to \$511 (if exposed or subject to order); or,
  - ◇ 2/3rds rate of pay up to \$200 per day (if caring for someone)
- ◇ Employer can require basic documentation in support of request, not before 7 days after employee has returned to work
- ◇ Full emergency paid sick leave available to new employees
- ◇ Requires employers to restore employees to their positions after returning from paid sick leave
- ◇ Eliminates large employer exemption and clarified that nonprofits are covered employers
- ◇ Eliminates Secretary of Labor's authority to issue regulations that exempt certain employers with fewer than 50 employees, health care providers, and emergency responders

# FFCRA: Launching Pad for Paid Parental Leave in the US?

- ◇ “[T]he U.S. is the only country among 41 nations that does not mandate any paid leave for new parents....”\*
- ◇ For the first time, FFCRA mandated paid family leave under certain circumstances related to COVID-19.
- ◇ FFCRA also provided COVID-related tax credits to employers who paid benefits under FFCRA.
- ◇ Might this pandemic, and the legislation that arises from it, lay the groundwork for the U.S. to provide paid parental leave in the future, like so many other nations do?

\*<https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/> (relying upon data compiled by the Organization for Economic Cooperation and Development (OECD), current as of April 2018)

Thank you