



## President Trump Signs the Families First Coronavirus Response Act

The COVID-19 coronavirus pandemic has had a rapid and dramatic effect worldwide, with cases in the United States topping 10,000 in the last 24 hours, and global reported cases exceeding 218,000. Many jurisdictions in the United States and abroad are subject to restrictive measures to reduce the incidence of new cases, including social distancing measures, curfews, “shelter in place” orders and lockdowns. In response, last night, President Donald J. Trump signed into law the Families First Coronavirus Response Act (“FFCRA” or the “Act”), an economic stimulus plan aimed at addressing the impact of the COVID-19 outbreak on Americans, which includes provisions for paid sick leave and an expanded family and medical leave act applicable to US employers. The FFCRA includes \$500 million for WIC nutrition programs, \$400 million for the Emergency Food Assistance Program; \$82 million for the Defense Health program, \$250 million of additional funding for home delivery food programs for the elderly and disabled, other waivers for food programs and school lunch programs, free COVID-19 testing without co-pays or deductibles. The provisions of the Act will become effective fifteen (15) days after it was signed, on **April 2, 2020**. Other relief bills currently under consideration, if passed, will include payments of \$1,000 per adult and \$500 per child.

This bulletin summarizes the benefit provisions of the FFCRA which affect employers, below.

### 1. Emergency Family and Medical Leave Expansion Act

- **Expanded Coverage and Eligibility** – The FFCRA considerably amends and expands FMLA on a **temporary** basis. First, the Act changes the current employee threshold for FMLA coverage from only covering employers with 50 or more employees to instead covering those employers with **fewer than 500 employees**. Second, it also lowers the eligibility requirement, so that **any employee who has worked for the employer for at least 30 days prior to the designated leave** may be eligible to receive paid family and medical leave, with certain exceptions discussed below, such as health care providers and first responders.
- **Reasons for Emergency Leave** – Any individual employed by the employer for at least 30 days prior to the first day of leave may take up to **12 weeks of job-protected leave** to allow an employee, who is unable to work or telework, to care for the employee’s child (under 18 years of age) if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

- **Paid Leave** – A significant change introduced by the FFRCA is paid leave under the FMLA. After the enactment of the Act, the first 10 days of Emergency FMLA may be unpaid. During this initial 10-day period, an employee may elect to substitute any accrued paid leave (such as vacation or sick leave) to cover some or all of the unpaid period. After the 10-day period, 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 usually be scheduled. The Act caps this pay entitlement to \$200 per day and \$10,000 in the aggregate, per employee.

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 prior to taking the newly-approved Emergency FMLA leave. Employees who have worked for less than six months prior to leave are entitled to be paid based on the employee’s reasonable expectation at hiring of the average number of hours the employee would typically be scheduled to work.

Employees have a duty to provide the employer with notice of the need for leave, to the extent possible.

- **Employment Reservation** – Employers who have 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon their return to work. However, employers with less than 25 employees are generally excluded from this requirement if the employee’s position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA. This exclusion is not automatic and 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.

Due to the significant modification of the requirements to be a covered employer or employee, thousands of employers not previously subject to the FMLA may now be required to provide job-protected leave to employees for a COVID-19 coronavirus-designated reason. However, the Act includes language allowing the Secretary of Labor to exclude certain employees, such as healthcare providers and emergency responders, from the definition of employees who are allowed to take such leave. In addition, the Secretary of Labor is vested with authority to exempt small businesses with fewer than 50 employees, if the required leave would jeopardize the viability of the operation. These provisions of the FFCRA will become effective on **April 2, 2020** and remain in effect until **December 31, 2020**.

## 2. Emergency Paid Sick Leave Act

- **Reasons for Paid Sick Leave** – The FFCRA also allows an eligible employee to take paid sick leave because the employee is:
  - ⇒ Subject to a federal, state or local quarantine or isolation order related to COVID-19;
  - ⇒ Advised by a health care provider to self-quarantine due to COVID-19 concerns;
  - ⇒ Experiencing COVID-19 symptoms and seeking medical diagnosis;
  - ⇒ Caring for an individual 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. It is noteworthy that the individual being cared for need not be a family member.
  - ⇒ 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
  - ⇒ 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** – Under the FFCRA, employers with **fewer than 500 employees** are required to provide full-time employees 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). The full allotment of 80 hours must be provided regardless of the employee’s duration of employment prior to leave. This section provides an exception for employers who are healthcare providers or emergency responders at their election.
- **Cap on Paid Sick Leave Wages** – Paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use, and to \$200 per day up to \$2,000 total to care for others and any other substantially similar condition.
- **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 prior to 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 any given two-week period.



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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 10 days of unpaid leave permitted by the Emergency Family and Medical Leave Expansion Act (summarized above).

Please note that the paid sick leave made available pursuant to the FFCRA will not carry over to the following year and may be used **in addition to** any paid sick leave currently provided by employers. There is no provision for payment of unused COVID-related leave upon termination. These provisions of the Act will become effective on **April 2, 2020**, and remain in effect until **December 31, 2020**.

Employers should take note that it would be unlawful to take action against employees who make use of the leaves discussed above. Furthermore, the FFCRA does not preempt local law, so Puerto Rico laws regarding sick leave, short term leave (SINOT) and worker's compensation (should the employee become infected in the workplace), and other statutes still apply.

### 3. **Emergency Unemployment Insurance Stabilization And Access Act Of 2020**

In addition to the above, the FFCRA provides \$1 billion in 2020 for emergency grants to states for activities related to unemployment insurance benefit processing and payment, under certain conditions.

Half of the resources are to be allocated to provide immediate funding to all states for administrative costs so long as they meet some basic requirements, including: (1) requiring employers to provide notification of the availability of unemployment compensation at the time of separation; (2) ensuring applications for unemployment compensation and assistance with the application process are accessible in at least two ways (in-person, by phone, or online); and (3) notifying applicants when their application is received and being processed, as well as providing information about how to ensure successful processing if the application cannot be processed.

The other half would be reserved for emergency grants to states which experience an increase of unemployment compensation claims of at least 10% in comparison to the same quarter in the prior calendar year. Those states would be eligible to receive an additional grant to assist with costs related to such an unemployment spike if they meet additional requirements, including: (1) expressing of commitment to maintain and strengthen access to unemployment compensation; and (2) taking or planning to take steps to ease eligibility requirements and access (like waiving work search requirements and the waiting period). The Act will provide those states that meet these requirements with 100 percent federal funding to provide extended unemployment benefits, up to an additional 26 weeks after the initial 26 weeks (i.e. up to 52 weeks of benefits). Previously, states were required to pay 50% of extended unemployment benefits. This provision will also remain in effect until December 31, 2020.



#### 4. Tax Credits for Paid Sick And Paid Family And Medical Leave

The FFCRA also sets up a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above. These tax credits are allowed against the employer portion of Social Security taxes. Specifically, employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.

Similarly, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

#### 5. Coverage For Testing For COVID-19

Finally, the FFCRA requires private health plans to provide coverage for COVID-19 diagnostic testing and related services to employees and their covered dependents, without cost sharing (such as deductibles, copayments or coinsurance) from date of 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. In addition to 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.

#### Prospective Guidance:

After the enactment of the FFCRA, employers with fewer than 500 employees are not only required to adhere to the above leave requirements within the next 15 days, but are also **required to provide notice to their employees through postings and policies**. The United States Department of Labor will issue posters that can be downloaded by employers to be posted in the workplace.



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# PUERTO RICO BUSINESS LAW NOTES

Labor & Employment  
Bulletin

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Employers operating in Puerto Rico should also keep in mind that the local government is evaluating similar emergency legislation to expand current paid sick leave and family and medical leave laws to cover coronavirus-related issues. If enacted, some of these laws may be in addition to these new requirements at the federal level.

Given the above described dynamics, the Labor and Employment Department of AMG is monitoring this constantly evolving situation. We encourage employers to periodically check the bulletins and updates of the CDC and the DOL. Likewise, you can also consult the Labor and Employment law team at AMG if you have any questions or any specific situation that you may want to discuss.



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