



As Employment and Labor Law attorneys here at Pearlman Brown & Wax, we understand that employers are experiencing deep concerns regarding COVID-19. Societal reactions to COVID-19 are changing on a daily basis. We understand that our employer clients want to be apprised of employee concerns, employee rights, and employer duties and obligations as a result of COVID-19 in the workplace. There are current pushes at the municipal, state, and federal level regarding assistance to employers and employees. The Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security (CARES) Act are two new federal laws that will impact Americans as a result of those efforts. The Department of Labor has issued guidance, and temporary regulations most recently on April 1, 2020, on how these new laws will be implemented. Here are the key takeaways for our clients to date.

Families First Coronavirus Response Act

Effective April 1, 2020 through December 31, 2020. Emergency leave and leave entitlements pursuant to FFCRA will expire on December 31, 2020. In general, employers with 500 or less employees are subject to this new law and should post this poster or distribute electronically by April 1, 2020 regarding employee rights at their place of business:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Emergency Paid Sick Leave

Under this new law effective April 1, 2020, employers with 500 or less employees are obligated to provide Emergency Paid Sick leave to employees who are eligible for leave related to COVID-19 if the employee is unable to work, including unable to telework, 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 his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
- 6.) Is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

- Full-time employees are eligible for up to two weeks of paid sick leave based on their regular rate of pay. Part-time employees are eligible for up to two weeks of paid sick leave based upon the average number of hours worked in a two week time period over a six month average.
- If an employee is taking Emergency Paid Sick leave related to reasons 1. through 3., the employee will be paid sick leave based on the higher of either their regular rate of pay, or the applicable State or Federal minimum wage with a maximum of \$511 per day or \$5,110 over the entire duration of sick leave pay.
- If an employee is taking paid sick leave for reasons 4. through 6., the employee will be paid sick leave based on 2/3 their regular rate of pay, or the applicable State or Federal minimum wage (whichever of the two is higher) with a maximum of \$200 per day or \$2,000 over the two week period of time.
- Please note, an employee may take up to two weeks total of paid sick leave under the FFCRA for any combination of the qualifying reasons (1. through 6.) outlined above.

Emergency Paid Family and Medical Leave

Effective April 1, 2020, full-time and part-time employees of private sector employers with fewer than 500 employees and who have been employed for at least 30 days prior to their leave request may be eligible for Emergency Family and Medical Leave.

If an employee is unable to work, including unable to telework, only because the employee is caring for his or her child under 18 years of age whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons, that employee is entitled to up to 12 weeks of leave (or an additional 10 weeks when combined with the two weeks of Emergency Paid Sick Leave).

An eligible employee's paid leave under this provision will be calculated based on an amount that is not less than 2/3 of the employee's regular rate of pay not to exceed \$200 per day and \$10,000 in total.

Reimbursement

For all paid leave provided under the FFCRA, Emergency Paid Leave or Emergency Paid Family and Medical Leave, employers are eligible for reimbursement of the costs of that leave through refundable tax credits. It is critical to maintain appropriate documentation for your records and the Internal Revenue Service (IRS) should be consulted to ensure the proper forms, instructions, and procedures are being followed to claim a tax credit.

Exemptions

FFCRA authorized the Department of Labor to issue guidance on the enforcement of the new law. One of the most important questions for our clients, especially smaller businesses, is whether the FFCRA applies to them. The Department of Labor released additional guidance, including the small business exemption, on Saturday, March 28, 2020, which provides:

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

- 1.) The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- 2.) The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- 3.) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Health care providers also qualify as employers that may be exempt under the FFCRS. Please note, it is critical to document whether the employer meets any of the above criteria, but the Department of Labor has requested the materials not be submitted to the Department of Labor proactively. Please maintain these for your records.

Enforcement

Though the FFCRA comes into effect on April 1, 2020, there is a temporary non-enforcement period through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts "reasonably" and "in good faith" when all of the following facts are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practicable. As explained in a Joint Statement by the Department, the Treasury Department and the Internal Revenue Service (IRS) issued on March 20, 2020, [2] this

program is designed to ensure that all covered employers have access to sufficient resources to pay required sick leave and family leave wages.

2. The violations of the Act were not “willful” based on the criteria set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (the employer “either knew or showed reckless disregard for the matter of whether its conduct was prohibited...”).
3. The Department receives a written commitment from the employer to comply with the Act in the future.

Coronavirus Aid, Relief and Economic Security (CARES) Act

The CARES Act, which was signed into law on March 27, 2020, provides approximately \$2 trillion in federal financial relief for individuals and businesses coping with the COVID-19 pandemic. Critically, this new law provides \$349 billion for individual small business loans under section 7(a) of the Small Business Act, to cover operating expenses during the period February 15 to June 30, 2020. These loans are designed to off-set some of the financial burden for businesses and assist in keeping businesses open and individuals employed. The new law also provides tax credits, loan forgiveness, and tax deferment.

IMPORTANT NOTE AND DISCLAIMER

Please note, the above is not an exhaustive list of all the changes to the law or resources for individuals and businesses. These new laws bring new challenges that often need to be handled on a case-by-case basis. Given the current fluid and rapidly evolving nature of the Coronavirus-COVID-19 pandemic in the United States, this memo constitutes our preliminary analysis and is provided solely as a reference tool to be used for informational purposes and is subject to change based on evolving information. Therefore it should not be construed or interpreted as providing legal advice related to any specific case or cases. Please know that we are here for you during this time. We are actively monitoring these changes daily and are available to provide any feedback, advice, and best practice tips to you as we navigate these trying times together. We are also available to draft policies or leave related documents as needed. Our firm is actively operational in every aspect. We are all working statewide and are available to address your concerns and questions. We are confident that we can get through these difficult times together.

Should you have any questions or concerns, please feel free to contact us. We are only an email or phone call away.

April 1, 2020

Copyright © 2020, Pearlman, Brown & Wax, L.L.P.