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**FAMILY BUSINESS CENTER**  
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**DVFC Webinar 4/2/20**

**FAMILIES FIRST CORONAVIRUS RESPONSE ACT and CARES ACT –  
What Employers Must Know in this Strange New World**

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**Introduction**

In response to the devastating economic impact of the COVID-19 crisis, on March 18, 2020, Congress passed the **Families First Coronavirus Response Act** (“FFCRA”) that became effective on April 1, 2020. The FFCRA applies to all private employers with fewer than 500 employees and to all public employers. In addition to various provisions regarding health insurance, the FFCRA contains two separate yet interrelated provisions critically important to small business, the first being the **Emergency Family and Medical Leave Expansion Act** (“FMLA Expansion Act”) which amends the FMLA, and the second being the **Emergency Paid Sick Leave Act** (“Sick Leave Act”) which mandates paid sick leave for certain COVID-19 related absences. Each will be addressed in turn, but the overriding change is that employers will be required to provide up to two weeks of paid sick leave to employees out due to COVID-19, and provide up to 12 weeks of *paid* FMLA leave for workers required to care for children whose school has closed or who have otherwise been left without daycare.

On Friday, March 27, 2020, President Trump signed into law the more than \$2 trillion coronavirus stimulus bill known as the **Coronavirus Aid, Relief, and Economic Security (CARES) Act**. Among other measures, the CARES Act provides a broad expansion of unemployment benefits. Current unemployment assistance is increased by \$600 a week for up to four months.

On top of these new laws, of course, Governor Wolf has directed non-life-sustaining business to close their physical operations, and further ordered people not to leave their homes under threat of criminal prosecution. The purpose of this presentation is to help guide local business through this maze of interconnected laws and directives.

## FMLA EXPANSION ACT

Prior to passage of the FFCRA, the FMLA allowed eligible employees to take a total of 12 weeks of unpaid leave if they suffered from their own serious health condition or had to care for an immediate family member suffering from a serious health condition. To address the millions of workers affected by prolonged school closures, *the FFCRA amended the FMLA to grant FMLA protected leave to employees unable to work (or telework) due to the need to care for a minor child if the child's school or place of care has been closed, or the child's daycare provider is unavailable due to a public health emergency.* Public health emergency under the FFCRA means an emergency with respect to COVID-19. A "child care provider" is defined as a provider who receives compensation for providing child care on a regular basis.

### What employees are eligible for expanded FMLA leave?

The FMLA allows leave to eligible employees only after they have worked for an employer for 12 months. The FMLA Expansion Act changes that:

“(A) ELIGIBLE EMPLOYEE.—

“(i) IN GENERAL.—In lieu of the definition in sections 101(2)(A) and 101(2)(B)(ii), the term ‘eligible employee’ means an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested under section 102(a)(1)(F).

(ii) RULE REGARDING REHIRED EMPLOYEES.—For purposes of clause (i), the term ‘employed for at least 30 calendar days’, used with respect to an employee and an employer described in clause (i), includes an employee who was laid off by that employer not earlier than March 1, 2020, had worked for the employer for not less than 30 of the last 60 calendar days prior to the employee’s layoff, and was re-hired by the employer.”

In addition, the request leave must be for a “qualifying need related to a public health emergency”, meaning “the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

### Paid leave

The FMLA allows only unpaid leave (unless the employee simultaneously uses available paid time off). However, the FMLA Expansion Act provides for a period of paid leave. The first 10 days of leave are unpaid, following which the remaining *leave shall be paid at a rate of two-thirds of the employee's regular rate of pay.* However, the employee can also elect to substitute accrued paid time off for the initial ten days of unpaid leave (\*see below regarding the Sick Leave Act). The pay is capped at \$200 per day and/or \$10,000 in the aggregate. In the case of an employee whose schedule varies week to week, the number of hours for which the employee’s regular rate is calculated shall be the average number of hours that the employee was scheduled per day over the previous six month period.

### Job Protection

The FMLA requires that an employee who takes leave be restored to the employee's same or equivalent position upon return. The FMLA Expansion Act relaxes that provision with regard to employers that employ less than 25 employees *under certain conditions*. If because of the public health emergency the employee's position no longer exists due to a change in economic conditions, or other change in operations, the employee need not be restored as long as the employer makes reasonable efforts to restore the employee. If that is not possible, the employer must contact the employee if a position becomes available within the next year.

### Health Care Worker and Small Business Exemption

The FMLA Expansion Act leave entitlements will not be afforded to all workers. Congress has authorized the Department of Labor to issue regulations that would exclude certain health care providers and emergency responders from its provisions. The Department of Labor may also issue regulations that would exempt a *business with fewer than 50 employees* if allowing an employee's leave would "jeopardize the viability of the business as a going concern." Per the Department of Labor, Wage and Hour Division, 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.

### No Private Cause of Action for Violation

Lastly, whereas the FMLA allows employees who have been deprived of their FMLA rights or have suffered retaliation for exercising their FMLA rights with a private cause of action against their employers, employers with less than 50 employees will not be subject to a private cause of action for a violation of these new provisions. Nonetheless, the Department of Labor can still bring an enforcement action so employers cannot violate the law with impunity.

## **Emergency Paid Sick Leave Act**

Under Federal law, and in most jurisdictions, employers are not required to provide paid sick leave to their employees. The FFCRA has changed that as far as COVID-19 is concerned.

### Eligible employees

The Sick Leave Act requires that employers provide *all employees* with paid sick time if the employee is unable to work (or telework) because:

1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised to self-quarantine;
5. the employee is caring for a child whose school has closed or whose childcare provider is unavailable due to COVID-19 precautions (like the amendments to the FMLA, the Secretary of Labor is authorized to issue regulations that would exempt small businesses with fewer than 50 employees from the paid sick leave requirements for persons taking leave to care for a child home from school if granting paid sick leave would jeopardize the viability of the business as a going concern) ; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Like the FMLA Expansion Act, an employer of an employee who is a health care provider or an emergency responder may exclude such an employee from application of the Sick Leave Act, and small businesses (<50 employees) may be exempt if imposition of the Sick Leave Act's requirements would jeopardize the viability of the business as a going concern.

### Duration of Paid Sick Leave

Full-time employees who are eligible for leave under the Sick Leave Act are entitled to 80 hours of paid leave, and part-time employees are entitled to paid leave equaling the number of hours they would work on average over a two week period. The Sick Leave Act caps the amount of sick leave an employer must pay at \$511 per day (\$5,110 in the aggregate) for an employee's use of sick leave for the employee's own COVID-19 health issues under reasons 1-3 above, or \$200 per day (\$2,000 in the aggregate) if the employee's use of sick leave is for reasons 4-6 above. An employee who takes sick leave due to their own COVID-19 condition is entitled to full pay (subject to the aforementioned cap), whereas an employee who uses paid sick time for any

use described in paragraphs 4-6 above must be compensated at the rate of two-thirds the employee's regular rate of pay (subject to the cap). Paid sick time under the Sick Leave Act is available for immediate use by the employee no matter how long the employee has worked for the employer. Moreover, *an employer may not require the employee to use other paid sick leave provided by the employer before the employee uses paid sick time made available under the Sick Leave Act.*

#### Employer Notice and Consequences of Violations

The Secretary of Labor has published a model notice advising of employee rights under the Sick Leave Act, and employers are required to post that notice at their place of employment. The link to the Department of Labor website with the poster is [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf) Employers (*including individuals*) who violate the Sick Leave Act by refusing to provide paid sick leave, or by unlawfully terminating employees who take paid sick leave, will be considered in violation of the Fair Labor Standards Act and subject to penalties including payment of wages, liquidated damages and attorneys' fees.

#### Relationship between FMLA Expansion Act and Paid Sick Leave Act

There is an intended interplay between the FMLA amendments and Sick Leave Act provisions. Most notably, although the amendments to the FMLA indicate that the first ten days of leave is to be unpaid, the Sick Leave Act requires that those first two weeks be paid. Therefore, the FFCRA mandates that employers pay employees who are required to miss work in order to care for a child home from school, or otherwise without daycare due to COVID-19, at a rate of two-thirds their regular rate of pay subject to the statutory caps. Both sections of the FFCRA allow for the Department of Labor to issue regulations that would provide some relief for small businesses, but until such regulations are promulgated, it is unknown what a small business would be required to show in order to be excused from the obligations otherwise imposed by this new law.

The Department of Labor, Wage and Hour Division, has a comprehensive webpage devoted to FFCRA issues, and can be accessed at <https://www.dol.gov/agencies/whd/pandemic>.

## Tax Credits

When an employer pays its employees, it is required to withhold from the employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. An employer then is normally required to deposit these federal taxes, along with the employer's share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941).

Under the FFCRA, employers who pay qualifying sick or child care leave now will receive a tax credit which will allow them to retain a portion of the payroll taxes equal to the amount of qualifying sick and child care leave that the employer paid, rather than pay those taxes to the IRS. This tax credit also includes the employer's share of Medicare taxes imposed on the leave wages and the employer's allocable cost of maintaining health insurance coverage for the employee during the leave period (qualified health plan expenses). The tax credit will be available for all such payments made during the period beginning April 1, 2020, and ending December 31, 2020.

The payroll taxes that are available for retention include withheld federal income taxes, and the employees' share of Social Security and Medicare taxes, as well as the employer's share of Medicare taxes.

Any leave paid under the FFCRA will not be subject to the employer portion of Social Security taxes as provided in the CARES Act which was enacted on March 27th.

In addition, the tax credits are refundable, that is, if an employer pays more in leave benefits than the employer owes to the IRS in payroll taxes, the IRS will cut a check to the employer for the overage.

Equivalent child care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on an individual's income tax return and will reduce estimated tax payments.

On Tuesday evening, March 31st, the IRS issued important guidance relating to the FFCRA tax credits. IR-2020-62 <https://www.irs.gov/newsroom/irs-employee-retention-credit-available-for-many-businesses-financially-impacted-by-covid-19>

The guidance provides a Q&A style overview of how businesses should calculate and claim the credits against their future payroll tax deposits. It offers additional details on the new credits and process, including:

More detailed guidance on how to determine the amount of the tax credit.

How to determine the amount of the allocable qualified health plan expense.

How to claim the credits using new IRS form 7200.

How an employer should substantiate eligibility for tax credits for qualified leave wages.

Taxation and deductibility of the tax credits.

Special provisions related to self-employed individuals.

## **CARES ACT – UNEMPLOYMENT COMPENSATION**

Of the many stimulus/relief provision Congress included in the CARES Act, the one that most directly and simply impacts employers and employees in this time of struggle is the section entitled Relief for Workers Affected by Coronavirus Act. In addition to the traditional unemployment compensation offered through the states to eligible employees, this Act expands the field of eligible employees, including self-employed persons. Most notably, it makes eligible for additional benefits to persons otherwise able and available to work if they became “unemployed, partially unemployed, or unable or unavailable to work” for a litany of reasons associated with COVID-19, including illness, quarantine, childcare, business closure, and “the individual has to quit his or her job as a direct result of COVID-19”. The Act does *not* apply to those who can work remotely or to those receiving paid sick leave or other paid benefits (such as FFCRA benefits).

Eligible worker may receive up to 39 weeks of additional unemployment benefits for weeks of unemployment, *or partial employment*, and through July 31, 2020, *those benefits shall include \$600 in weekly benefits in addition to the amount determined under state law.*

For more information specific to unemployment compensation, visit the Office of Unemployment Compensation’s website at <https://www.uc.pa.gov/COVID-19/Pages/Employer-COVID19-FAQs.aspx>.

## **CONCLUSION AND RESOURCES**

Legislation, regulation, orders and guidance is coming fast and furious. The Business Advisory Group at HRMM&L stands by ready to assist its business clients navigate through these troubled waters. Please contact Ethan O’Shea with any questions at (215) 616-1521 or [EOShea@HRMML.com](mailto:EOShea@HRMML.com), or Jon Samel at (215) 616-1508 or [JSamel@hrmml.com](mailto:JSamel@hrmml.com).