We're Building a Better Future

FCA INTERNATIONAL 2.0

Educate | Advocate | Legislate

To: FCA International Contractor Members
From: FCA International Legal Counsel
Subject: **FFCRA: Frequently Asked Questions – What Contractors Need to Know**
Date: March 19, 2020

COVID-19 PAID LEAVE IS NOW LAW

Yesterday, President Trump signed into law the "**Families First Coronavirus Response Act**" or "**FFCRA**" (H.R. 6201). The new law creates two new types of paid leave: (1) Public Health Emergency Leave ("Emergency FMLA") and (2) Emergency Paid Sick Leave ("Emergency PSL").

A few important pieces of information:

- *First*, the new law applies ***only*** to those employers with "***fewer than 500 employees***." Thus, if you have 500 or more employees, this law does not apply to you.
- *Second*, the FFCRA's paid leave provisions do not go into effect until "15 days after the date of enactment." This means that these provisions will take effect on ***April 2, 2020***.
- *Finally*, although the costs of these new requirements will be borne by small to medium size employers, the costs of providing the new paid leaves are designed to be offset by refundable payroll tax credits.

There are understandably many questions about the new law. We anticipate receiving additional guidance from the Department of Labor ("DOL") and the IRS on many of these issues. Nevertheless, to assist employers in preparing for these new requirements, we have prepared a list of Frequently Asked Questions ("FAQs") regarding the FFCRA.

Basic Requirements

What are the paid leave requirements in the FFCRA?

In addition to providing funding for food-assistance programs, state unemployment insurance, and COVID-19 testing, the FFCRA requires employers with "***fewer than 500 employees***" to provide two types of ***paid*** leave:

- **Emergency FMLA** – The FFCRA amends the Family and Medical Leave Act ("FMLA") to provide employees with 12 weeks of ***job-protected*** Emergency FMLA.
    - **Leave Must be Because Child's School or Daycare Is Closed** – The FFCRA allows employees to take leave only if "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." Prior versions of the law allowed the leave for other reasons, but they were removed.

- **First 10 Days Are Unpaid** – While the first 10 days of leave are unpaid, an employee may choose to use accrued vacation days, personal leave or any other available paid leave for unpaid time off. The employee may also use his or her balance of Emergency PSL, which is described below.

- **Remaining Leave is Paid at Two-Thirds Pay** – While the first 10 days of leave are unpaid, the remaining leave (up to 12 weeks total leave) would be ***paid*** by the employer at two-thirds of the employee's "regular rate." The weekly compensation owed to the employee would be paid based on "the number of hours the employee would otherwise be normally scheduled to work."

- **Paid Leave Is Capped at $200 per day (or $10,000 Total)** – An employee's payout for Emergency FMLA is capped at $200 per day or $10,000 total per employee. This aligns with tax credits that are available to employers. This means that employers are not required to pay out more in benefits than they can obtain back from the government in terms of refundable tax credits.

- **Emergency PSL** – The FFCRA also requires employers with ***fewer than 500 employees*** to provide employees with a bank of paid sick leave that can be used as a result of absences related to COVID-19. The leave must be immediately available 15 days after enactment (i.e., April 2, 2020) and must be used on or before Dec. 31, 2020.

    - **Amount of Emergency PSL** – Employers with ***fewer than 500 employees*** must provide ***all*** full-time employees with a bank of 80 hours of Emergency PSL. Part-time employees must receive an amount based on the "number of hours that such employee works, on average, over a two-week period."

    - **Uses of Emergency PSL** – The FFCRA provides that Emergency PSL may be used for any of the following purposes if the employee is "unable to work (or telework) due to a need for leave 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 because of COVID-19;
        3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
        4. The employee is caring for an individual subject or advised to quarantine or isolation;
        5. The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
        6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

    - **Coordination with Existing Paid Leave Policies** – As written, the FFCRA suggests that Emergency PSL must be ***separate and apart*** from other types of paid leave (e.g., PTO, sick time, etc.). However, an earlier version of the law mandated that Emergency PSL

be provided "***in addition to***" any other paid sick leave provided by the employer "on the day before the enactment of the Act."

By removing this provision, it may be possible for an employer to comply with the law by providing Emergency PSL ***before*** the effective date of the law (i.e., April 2, 2020). A more difficult question is whether the employer can satisfy the Emergency PSL requirement by providing the leave via an ***existing*** PTO or sick leave policy that meets or exceeds the minimum requirements of the law. That question may be answered by additional guidance from the DOL.

- **Payment Is Capped** – An employer's payment of Emergency PSL is capped at $511 per day ($5,110 in the aggregate) if the leave is taken for an employee's own illness or quarantine and $200 per day ($2,000 in the aggregate) if the leave is taken for the care for others or school closures. Again, this aligns the employer's payments with the caps on available tax credits.

Effective Date

When does the law go into effect?

The paid leave provisions of the FFCRA go into effect on ***April 2, 2020***.

Coverage and Eligibility for Emergency FMLA

What employers need to provide Emergency FMLA?

All businesses with ***fewer than 500 employees*** need to provide 12 weeks of job-protected Emergency FMLA to eligible employees.

It is true that the FMLA generally applies only to employers with "***50 or more employees***." However, the FFCRA would create a different definition of "qualified employer" for Emergency FMLA – namely, an employer with "fewer than 500 employees."

Small employers may, however, be eligible for one of the following possible exemptions:

- *First*, the DOL has the regulatory authority to exempt employers with "fewer than 50" employees, if the DOL determines that the requirements of the FFCRA would "jeopardize the viability of the business as a going concern."

- *Second*, employers with fewer than 25 employees may be exempt from the reinstatement requirement if certain conditions are met, including: the elimination of the employee's position and the employer takes reasonable steps to restore the employer to a similar position.

- *Third*, the FFCRA provides that employers with fewer than 50 employees cannot be sued by a private plaintiff under Section 107(a) of the FMLA for violating the Emergency FMLA provision (Section 102(a)(1)(F) of the FMLA, as amended). The employer may, however, still be subject to an enforcement action by the DOL under Section 107(b) of the FMLA.

Who is eligible for Emergency FMLA?

Instead of the normal FMLA definition of "eligible employee," which includes a one-year and 1,250-hour service requirement, the FFCRA broadens eligibility for Emergency FMLA to ***any*** employee "who has been employed for at least ***30 calendar days***."

What if an employee has already exhausted their FMLA for this leave year?

While the law does not provide specific guidance, a plain reading of the amended FMLA statute suggests that, regardless of reason, an employee is only eligible for "a total of 12 workweeks of leave during any 12-month period." The Emergency FMLA is a new type of FMLA leave and would seemingly reduce an employee's eligibility for other types of FMLA.

Thus, unless there is contrary guidance from the DOL, it appears likely that an employee who has already exhausted 12 weeks of leave in conjunction with another qualifying reason (e.g., the birth or adoption of a child), it is likely that employee would not be eligible for Emergency FMLA in the same leave year. If, however, the previous leave related to a "qualifying exigency" or care of a military member, it is possible that the employee could be eligible for additional FMLA (i.e., up to 26 weeks of leave).

What about an employee who are currently out on FMLA?

This is a difficult question and not addressed by the new law. As noted above, the employee's previously-used FMLA in the same leave year would likely be credited against any entitlement for Emergency FMLA. It is not clear, however, whether an employee could convert from one type of unpaid FMLA (e.g., in conjunction with the birth or adoption of a child) to paid Emergency FMLA. Nothing expressly prohibits it, but we will likely need additional guidance from the DOL.

Coverage and Eligibility for Emergency PSL

What employers need to provide Emergency PSL?

All businesses with ***fewer than 500 employees*** need to provide full-time employees with 80 hours of Emergency PSL on ***April 2, 2020*** (i.e., the effective date of the FFCRA). Part-time employees receive a prorated balance based on the number of hours that they work, on average, over a 2-week period.

For small employers, FFCRA provides the DOL with the authority to exempt employers with "fewer than 50 employees" from the Emergency PSL requirement, if the DOL determines that the requirement would "jeopardize the viability of the business as a going concern."

Who is eligible for Emergency PSL?

The definition of "employee" for purposes of Emergency PSL incorporates Section 3(e) of the FLSA. The FLSA has a broad definition of employee: "any person acting directly or indirectly in the interest of an employer . . . ."

Importantly, for Emergency PSL, there is no "hours of service" requirement, similar to the 30-day service requirement for Emergency FMLA. This likely means that ***all*** employees who are employed by a covered employer on April 2, 2020 are entitled to a bank of Emergency PSL based on their hours worked (up to 80 hours).

Unlike many paid sick leave laws, there is no "waiting period" before an employee can use Emergency PSL. Indeed, the FFCRA provides that Emergency PSL "shall be ***immediately available for use***."

Exceptions

How do you determine whether you have 500 or more employees?

Remember, employers with 500 or more employees do ***not*** need to provide Emergency FMLA and Emergency PSL.

While the law does not specify how employees are to be counted, the Emergency PSL defines "employee" by reference to the FLSA. The FMLA definition of "employee" similarly incorporates the FLSA definition.

Thus, for counting purposes, employers should look to the broad definition of "employee" under the FLSA – that is, "any person acting directly or indirectly in the interest of an employer." 29 U.S.C. § 203(e). This would presumably include, for example, any employees who are "***jointly employed***" by the employer under the DOL's current definition of "joint employment."

Are there exceptions for small employers?

Yes and no. As noted above, both the Emergency FMLA and Emergency PSL requirements of the FFCRA apply to ***all employers with 1-499 employees***.

However, the FFCRA provides the DOL with the regulatory authority to exempt employers with "fewer than 50 employees" (i.e., 1-49 employees) from either (or both) paid-leave requirements if the DOL determines that "imposition of such requirements would jeopardize the viability of the business as a going concern." We will therefore have to wait for the regulations from the DOL.

In addition, as noted above, the job-restoration requirements of Emergency FMLA may be waived for employers with fewer than 25 employees, provided certain conditions are met. And, employers with fewer than 50 employees are not subject to private FMLA lawsuits.

Are certain types of employees exempt?

Yes, both the Emergency FMLA and the Emergency PSL include exclusions for "Health Care Providers" and "Emergency Responders." The exclusions basically give their employer the ability to "elect" to exclude the individual from the requirements of each form of leave. There does not appear to be any limit on the employer's discretion to make this election.

The FFCRA also directs the DOL to provide regulatory guidance on this issue, so we expect further guidance on this.

Employers Subject to Collective Bargaining Agreements

Does the FFCRA Apply to Employers with a CBA?

Yes, as noted above, the law would apply to ***all*** businesses with ***fewer than 500 employees***, including those who have a CBA.

In fact, the law specifically provides that employers who are signatory to a multiemployer CBA are permitted to satisfy their paid leave obligations under the FFCRA by making contributions to a multiemployer fund, plan or program. The law makes clear, however, that employees must be able to receive payment from the fund, plan or program for any paid leave that would have otherwise been paid by their employer.

By specifically providing an alternative method of compliance, the law appears to assume that employers subject to a CBA will be covered, provided that they employ fewer than 500 employees.

Do I have to pay "fringes" (health insurance, pension, etc.) on the payments I make to union employees taking Emergency FMLA or Emergency PSL?

Likely no. The payments under both the Emergency FMLA and the Emergency PSL are tied to the definition of "***regular rate of pay***" under the FLSA (29 U.S.C. § 207(e)). Remember, too, that the amounts are capped per the amounts discussed above.

Under the FLSA, the definition of "***regular rate***" ***excludes*** several amounts, including: "***contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.***" 29 U.S.C. § 207(e)(4). Thus, any payments to employees pursuant to the provisions of the FFCRA would, by definition, ***exclude*** amounts payable to a pension plan or health and welfare plan.

The Union may claim that the CBA requires payment of fringes on amounts paid pursuant to the FFCRA. While the strength of this argument would likely depend on the text of your CBA, it would be very difficult for the Union to claim that the amounts paid under the FFCRA were contemplated by the parties at the time they negotiated the CBA and, somehow, intended that these amounts be paid to the fund.

Are there any other steps that a unionized business must take?

Remember, if you have a current CBA, you'll need to give the union notice and an opportunity to bargain before implementing any changes that affect employees' terms and conditions of employment.

However, we recommend having a plan in place for complying with the FFCRA requirements before agreeing to meet with the Union. If the Union reaches out, let them know that you are reviewing the law with labor counsel and will be in contact soon.

Layoffs, Closures, and Other Issues

If a jobsite is closed and everyone is laid off, would I still have to provide paid leave?

This is a difficult question and, in the absence of regulatory guidance from the DOL, we can only provide general guidance. Each situation is different and you should seek legal advice before making any decision. Indeed, in addition to your potential obligations under the FFCRA, you may have obligations under ***other*** state and federal laws, such as the WARN Act, the FLSA, ERISA, and COBRA.

As an initial matter, employees whose employment is terminated (or employees who are laid off because of lack of work) ***before*** April 2, 2020, would likely ***not*** be eligible for Emergency PSL or Emergency FMLA. This is because they do not need "leave" for a job that does not exist. The text of the FFCRA appears to assume that (i) work is available and (ii) that the employee is "unable to work (or telework)" because of a qualifying reason.

As a result, if there is no work for the employee to perform (because of layoff or termination), there should be no Emergency PSL or Emergency FMLA obligation. The employee would, of course, likely be eligible for unemployment pursuant to the state unemployment statute.

A more difficult question is posed by a situation where an employer decides to close a jobsite (and lay off everyone) ***on or after*** April 2, 2020. Akin to the example above, the absence or inability of the employee to work is ***not*** effectuated by an employee's "need for leave" as defined by the FFCRA but rather by the lack of work available (because the employer has closed or the jobsite is closed). Thus, it is likely that Emergency PSL and Emergency FMLA are not available in this circumstance.

This analysis is buttressed by the fact that employees are typically not allowed to use paid sick leave or PTO for times when they are not scheduled to work. Likewise, the FMLA (at least before it was amended) made clear that an employee on leave is entitled to no greater protection from a layoff as any other employee. See 29 C.F.R. § 825.216(a)(1).

Thus, an employee on a job-protected FMLA leave (e.g., birth of a child or "serious health condition") was not protected from termination if the employer made a non-discriminatory decision to conduct a layoff or reduction in force that happened to affect the employee on FMLA. It remains to be seen whether the FFCRA changed this standard, and we will likely need additional regulatory guidance from the DOL before we have a definitive answer.

As you can see, this issue is a difficult one and, given the questions surrounding the new law, it is best to get legal advice regarding your obligations.

Tax Credits and Employers with Cash-Flow Issues

How does my company get reimbursed by the IRS?

As to Emergency FMLA, the FFRCA provides that "there shall be allowed as a credit against the tax imposed by section 3111(a) of the Internal Revenue Code of 1986 for each calendar quarter an amount equal to ***100 percent of the qualified family leave wages*** paid by such employer with respect to such calendar quarter."

There is a cap on the employer's tax credit for each employee's paid Emergency FMLA: $200 per employee per day and $10,000 total per employee. As noted above, this aligns with the maximum payout to employees who use Emergency FMLA.

With respect to Emergency PSL, the FFRCA provides that "there shall be allowed as a credit against the tax imposed by section 3111(a) of the Internal Revenue Code of 1986 for each calendar quarter an amount equal to ***100 percent of the qualified sick leave wages*** paid by such employer with respect to such calendar quarter."

There are, however, caps on the employer's tax credit:

- $511 per day ($5,110 in the aggregate) if the leave is taken for an employee's own illness or quarantine, and
- $200 per day ($2,000 in the aggregate) if the leave is taken for the care for others or school closures.

Nevertheless, as noted above, tax-credit caps are aligned with the maximum payout to employees under the circumstances outlined above.

How do I provide the paid leave if my business is having cash-flow issues or in danger of going out of business?

During a March 14 press conference, Treasury Secretary Steven Mnuchin stated that the Treasury Department will be issuing guidance allowing companies to ***get the money in advance*** from the IRS:

> "I want to emphasize, small and medium size businesses that have 'cash flow problems' – ***we will issue guidelines, [and] you will be able to come to the IRS and get the money in advance, so that you don't have cash flow issues***."

In addition, as noted above, the FFCRA does provide the DOL with the regulatory authority to exempt businesses with fewer than 50 employees from providing Public Health Emergency Leave and Emergency Paid Sick Leave if the DOL determines that "the imposition of such requirements would jeopardize the viability of the business as a going concern."

What if my business has significant tax liability due on April 15?

On March 18, the IRS announced that, for C Corporations, income tax payment deadlines are being automatically extended until July 15, 2020, for up to $10 million of their 2019 tax due. This relief also includes estimated tax payments for tax year 2020 that are due on April 15, 2020.

Other Questions

Who do I contact with additional questions?

If you have questions about the FFCRA or any other proposed legislation, please contact FCA International at (866) 322-3477 or by email at fca@finishingcontractors.org.