

Navigating COVID-19 Legislation & the Impact on Employers

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Overview

- ❖ Families First Coronavirus Response Act
- ❖ Unemployment under the CARES Act
- ❖ Return to Work Considerations

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

“FFCRA”

A Very Accelerated Timeline

- ❖ March 13: President declares a National Emergency
- ❖ March 18: President signs Families First Coronavirus Response Act (FFCRA)
- ❖ March 20: IRS announces employers are immediately able to recoup FFCRA payroll taxes
- ❖ March 24: DOL issues initial FFCRA FAQs
- ❖ March 25: DOL issues FFCRA Notice
- ❖ March 26: DOL issues updated FFCRA FAQs
- ❖ March 27: President signs Coronavirus Aid, Relief and Economic Security Act (CARES Act)
- ❖ March 28: DOL issues further updated FFCRA FAQs
- ❖ April 1: FFCRA becomes effective and regulations are issued by the Department of Labor
- ❖ April 17: FFCRA enforcement begins

FFCRA Key Provisions

- ❖ Effective April 1, 2020 (enforcement began April 18)
- ❖ Applies to employers with fewer than 500 employees (with some exceptions)
- ❖ Provides for certain tax credits for mandated COVID-19 related pay
- ❖ Must provide up to 80 hours of paid sick leave to qualified employees affected by COVID-19 (PSL)
- ❖ Must provide up to 12 weeks of job-protected enhanced emergency FMLA leave for qualified employees unable to work because of a need to care for a child due to a school closure, daycare closure, or childcare disruption related to COVID-19 (E-FMLA)
 - ❖ First 10 days unpaid (likely qualify for PSL)
 - ❖ Remaining time paid at 2/3 of employee's regular rate
- ❖ Only available to employees who remain on the payroll during the period from April 1 through December 31, 2020
 - ❖ Furloughed or laid off employees are ineligible for FFCRA benefits and, instead, are eligible for unemployment benefits

PAID SICK LEAVE

Emergency Paid Sick Leave Act

- ❖ Requires all public and private employers with fewer than 500 employees (measured at the time an employee's leave is to be taken) to provide up to two (2) weeks of PSL if an 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. (**Important Note**: there is uncertainty surrounding whether an employer who is forced to close because of a federal, state, or local shelter in place or stay at home order, for instance non-essential employers subject to Illinois' Executive Order No. 8, is required to provide PSL. The spirit of the FFCRA indicates yes, but Department of Labor FAQs and Regulations call this conclusion into question.)
 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 an order as described in subparagraph (1) or has been advised as described in paragraph (2).
 5. The employee is caring for a child of such employee if the school or place of care of the child has been closed, or the child care provider of such child is unavailable, due to COVID-19 precautions.
 6. The employee is 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.

Who is entitled to PSL?

- ❖ All employees are entitled to PSL, regardless of length of service
 - ❖ “Health care providers” may be excluded, as may “emergency responders”
 - ❖ An employer with less than 50 employees may be exempt from providing child care-related PSL if doing so would jeopardize the viability of the business as a going concern

Small Employer Exception

- ❖ Qualify if less than 50 employees and:
 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.
- ❖ Exception ONLY applies to child care-related PSL

How much PSL/Rate?

- ❖ Employees are entitled to the following amounts of PSL:
 - ❖ For full-time employees, up to **80 hours**
 - ❖ For part-time employees, up to the number of hours that the employee works, on average, over a **2-week** period
- ❖ When PSL is needed for reasons #1, #2 and #3 (government order, health care directive, or COVID-19 symptoms and seeking diagnosis), sick leave is paid at the employee's **regular rate of pay** and is capped at **\$511 per day** or a total of **\$5,110**
- ❖ When needed for reasons #4, #5 and #6 above (caring for another, including child without school/daycare), sick leave is paid at **two-thirds (2/3)** of the employee's regular rate and is capped at **\$200 per day** or a total of **\$2,000**

Documentation

- ❖ Employers may require that employees taking PSL provide documentation, including the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work (including telework) for that reason, and the dates involved
- ❖ Additional documentation of the qualifying reason for the leave may also be required, such as written documentation from a health care provider advising the employee to self-quarantine due to COVID-19 related concerns or a copy of the federal, state or local quarantine or isolation order
- ❖ To claim the applicable tax credits, employers should require and maintain such documentation
- ❖ The IRS may issue forms and/or further instructions on what is needed to support a PSL tax credit claim

EMERGENCY FMLA LEAVE

Public Health Emergency Leave expansion of FMLA

- ❖ All public and private employers *with fewer than 500 employees* required to provide up to 12 weeks of job-protected enhanced emergency FMLA leave if an eligible employee is unable to work or telework:
 - ❖ Only if the need for leave is due to the need to care for a child under 18 years of age if the school or place of care has been closed or the child care provider is unavailable, due to a public health emergency (defined as “an emergency with respect to COVID-19 declared by a Federal, State, or local authority”)
- ❖ Does not create an entitlement to another 12 weeks if FMLA is already used;
 - ❖ Simply creates another qualifying reason for use of FMLA

Whose Entitled to E-FMLA?

- ❖ Any employee who has been employed for at least 30 calendar days is entitled to E-FMLA leave, whether full-time or part-time
 - ❖ “Health care providers” can be excluded, as can “emergency responders”
- ❖ An employer with fewer than 50 employees may be exempt from providing E-FMLA *if* doing so would jeopardize the viability of the business as a going concern
- ❖ The Act exempts employers with fewer than 50 employees in a 75-mile radius from damages in a civil lawsuit brought by an employee but does *not* exempt such employers from enforcement actions by the Department of Labor

How Much E-FMLA/Rate?

- ❖ The first **ten (10) days** of the E-FMLA leave may be **unpaid**
 - ❖ The *employee* may choose to substitute accrued vacation leave, personal leave, or other medical or sick leave, but the employer cannot require substitution
 - ❖ Also, an employee who qualifies for E-FMLA leave, due to a school or daycare closure, may use his or her 2 weeks of PSL sick benefits (paid at two-thirds of the employee's regular rate)
- ❖ **After the 10 days of unpaid leave** (or paid leave (paid at two-thirds of the employee's regular rate if PSL is applied to the first 10 days)), employers must pay employees during E-FMLA leave (for the reason listed above) at no less than **two-thirds** of the employee's regular rate of pay for the number of hours the employee would have been normally scheduled to work
 - ❖ This paid leave is capped at **\$200 per day** and \$10,000 total
 - ❖ An employer may (but does not have to) agree to allow employees to supplement the amount received under the E-FMLA leave, up to normal earnings, with preexisting leave (Example: permit an employee receiving two-thirds of his or her regular rate to use preexisting paid leave to receive the additional one-third, i.e. his or her complete regular compensation)

Documentation

- ❖ Employers may require that employees taking E-FMLA provide documentation, including the employee's name, statement that the employee is unable to work (including telework) because he or she needs to care for a child under 18 years of age because the child's school or place of care has been closed or the child care provider is unavailable, and the dates involved
- ❖ Additional documentation of the qualifying reason for the leave may also be required, such as a notice posted on the school or place of care's website or an email from an employee or official of the school or place of care
- ❖ To claim the applicable tax credits, employers should require and maintain such documentation
 - ❖ This is true even when the first 2 weeks are covered by PSL and documented for that purpose
- ❖ Existing FMLA certification and recertification requirements remain in effect
- ❖ The IRS may issue forms and/or further instructions on what is needed to support a E-FMLA tax credit claim

Tax Credits for FFCRA Leave

- ❖ Employers may begin taking advantage of new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing COVID-19 related leave to their employees
- ❖ To pay for these new benefits, the IRS is allowing employers to offset their federal income and payroll withholdings by the amount of paid leave
 - ❖ Eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS
- ❖ If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS
 - ❖ The IRS expects to process these requests in two weeks or less
- ❖ Thus, in effect, employers are supposed to pay employees for the newly allowed leave by using trust fund taxes previously withheld from employee pay
 - ❖ Those taxes do not have to be remitted to the IRS
- ❖ This means employers will be able to retain taxes from federal, social security and Medicare taxes, rather than pay the taxes to the federal government, in order to pay employees taking paid leave under the FFCRA effective April 1, 2020
 - ❖ Employers may retain the specified employment taxes from all employees to pay for FFCRA benefits, and not just the taxes for the employees to whom they must provide benefits under the new statute

UNEMPLOYMENT UNDER THE CARES ACT



Unemployment Basics

- ❖ Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was enacted March 27, 2020
- ❖ Title II, Section A of the CARES Act, named the "Relief for Workers Affected by Coronavirus Act" provides for enhanced unemployment benefits
 - ❖ Expands unemployment eligibility until December 31, 2020
 - ❖ Self-employed individuals, gig workers, and those who exhausted pre-existing benefits
 - ❖ Additional 13 weeks of eligibility
 - ❖ Increases benefit amount until July 31, 2020
- ❖ Previously, unemployment benefits was handled by states
- ❖ Under the CARES Act, unemployment benefit programs are joint federal-state programs
 - ❖ Each state determines eligibility criteria and state benefit amounts
 - ❖ The CARES Act requires states to enter into certain agreements with the federal government

Federal Pandemic Additional Benefits

- ❖ Section 2104
- ❖ Additional \$600 a week to qualifying individuals
 - ❖ Payable by state to be reimbursed by federal government
 - ❖ Available beginning March 29, 2020 until July 31, 2020
 - ❖ Individuals who are eligible for even \$1 of state unemployment benefits in a given week are eligible for the \$600 benefit

Extended Duration

- ❖ Section 2107
- ❖ Previously, an individual could receive a maximum of 26 weeks of unemployment benefits
- ❖ The CARES Act provides for an additional 13 weeks of eligibility, increasing the maximum to 39 weeks total
- ❖ Reimbursable by federal government

Expanded Eligibility

- ❖ Under Section 2102, individuals otherwise ineligible for federal and state unemployment programs, who would be able to work if not for COVID-19 are now eligible for benefits
 - ❖ Includes individuals laid off or furloughed as a direct result of COVID-19, self-employed individuals, gig workers, independent contractors, individuals with limited work history, and individuals who have exhausted their eligibility under existing state and federal unemployment programs
 - ❖ Such individuals must self-certify that they are unemployed, partially unemployed, or unavailable or unable to work because:
 - ❖ Individuals can also self-certify if they are self-employed, seeking part-time employment, do not have sufficient work history, or otherwise would not qualify for unemployment and meet any of the above criteria

Eligibility and Certification

- ❖ The required self-certification must demonstrate that the individual is unemployed, partially unemployed, or unavailable or unable to work because:
 - ❖ The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - ❖ A member of the individual's household has been diagnosed with COVID-19;
 - ❖ The individual is providing care for a family member or member of the individual's household who has been diagnosed with COVID-19;
 - ❖ A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
 - ❖ The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
 - ❖ The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - ❖ The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
 - ❖ The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
 - ❖ The individual has to quit his or her job as a direct result of COVID-19; or
 - ❖ The individual's place of employment is closed as a direct result of the COVID-19 public health emergency

Eligibility and Certification: Self-employed and gig workers

- ❖ Workers who received an IRS Form 1099 are newly eligible for unemployment benefits under the CARES Act
- ❖ Receiving a denial for regular unemployment benefits is a mandatory first step:
 - ❖ Must first apply as usual, then when given an eligibility of \$0, appeal or file claim for the federal benefits

Waiting Period

- ❖ Section 2105 provides funding to fully reimburse states that either do not have the one-week waiting period, or that waive such waiting period, and provide unemployment compensation to individuals for their first week of regular unemployment
- ❖ Such costs will be fully covered through December 31, 2020
- ❖ Section 5 of Governor Pritzker's Executive Order No. 5 states, "During the duration of the Gubernatorial Disaster Proclamation (https://www.iml.org/cms/files/pages/GOV_2020-03-09.pdf), the provision of the Unemployment Insurance Act, 820 ILCS 405/500(D), requiring a one-week waiting period for unemployment insurance claims is suspended for claimants who are unemployed and who are otherwise eligible for unemployment insurance benefits." <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-07.aspx>
 - ❖ Therefore, currently the one week waiting period is waived in Illinois
- ❖ State-by-state

Ineligibility

- ❖ Individuals receiving paid leave under the Families First Coronavirus Response Act
- ❖ Individuals working from home without a reduction in hours
- ❖ In most instances, individuals impacted by a salary reduction, though there are exceptions

Chargeability

- ❖ Some states have enacted legislation eliminating or reducing employer chargeability, i.e. the employer's contribution to unemployment benefits, during the COVID-19 pandemic
- ❖ Illinois has not and likely will not do so
- ❖ IDES stated:
 - ❖ The programs under the federal stimulus legislation are funded by the federal government and not Illinois. For regular unemployment compensation, employers generally contribute to the cost of benefits for their former employees. **The contribution rate of an experience-rated employer is based, in part, on the amount of unemployment benefits paid to the employer's former employees, so this rate may rise when an employer furloughs or lays off employees due to COVID-19.** If legislation is passed making claims related to COVID-19 non-chargeable to the employer, then employers furloughing or laying off workers due solely to COVID-19 would not be required to contribute to the benefit costs, and the costs would be "pooled" between all employers. This would likely result in increased unemployment tax rates in future years for all employers because the entire pool of employers would need to be tasked with replenishing the benefit trust fund.

Work-Share Programs

- ❖ Illinois has a “Short-Time Compensation” Program created via 820 ILCS 405/502, but has never enacted the program
- ❖ Because the CARES Act creates financial incentives for states to implement such programs, Illinois will likely activate its program
- ❖ As an alternative to layoffs/furloughs, such programs encourage employers to reduce the number of hours employees work during a given week and have unemployment compensation make some of the difference in income

Helpful Resources

- ❖ <https://www2.illinois.gov/ides/Pages/COVID-19-and-UI-for-E>
- ❖ <https://www2.illinois.gov/ides/Pages/COVID-19-and-UI-for-Claimants-FAQ.aspx>
- ❖ <https://www2.illinois.gov/ides/Pages/COVID-FPUC-FAQ.aspxemployers-FAQ.aspx>
- ❖ <https://www.illinoisworknet.com/LayoffRecovery/Pages/RapidResponseServices.aspx>

RETURN TO WORK: PRACTICAL CONSIDERATIONS

Testing and Screening

❖ Screenings Permitted

- ❖ e.g., temperature taking
- ❖ Testing must be job-related and consistent with business necessity (e.g., a direct threat)
- ❖ Tests should be accurate and reliable

❖ FDA and CDC have guidance regarding testing

❖ Maintain confidentiality of employee medical information

- ❖ Including logs of temperatures
- ❖ Including any statement by an employee that he/she has, or suspects he/she has, COVID-19

Safety

- ❖ Key: Effectively communicate policies and expectations
- ❖ Routine cleaning
 - ❖ Review CDC guidance on worksite cleaning
 - ❖ <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>
- ❖ Review any applicable state or local requirements
- ❖ Personal Protective Equipment (PPE)
 - ❖ Supply masks
 - ❖ Hand-sanitizer
 - ❖ For public interaction, consider gloves and shields/barriers
- ❖ Document training on distancing and handwashing

Other Safety Controls

- ❖ Design or administrative concerns can enhance safety, as well
 - ❖ Expanding work-from-home opportunities
 - ❖ Flexible sick leave and documentation policies (i.e., Dr.'s notes)
 - ❖ Splitting shifts or staggering work-from-home
 - ❖ Limiting employee meetings or personal interactions
 - ❖ Spacing work stations or marking 6' gaps
 - ❖ Redesigning communal areas
 - ❖ Ventilation system controls – increasing rates, decreasing recirculation, maintenance

Accommodation under the ADA

- ❖ COVID-19 may have additional employees requesting accommodations due to underlying conditions (such as age, heart disease, pulmonary disease, etc.).
 - ❖ Generally, be cautious of discrimination and do not assume either the presence of an underlying condition or the impact of that condition on an employee with regard to COVID-19. Particular concerns here are age, pregnancy, and disability discrimination. For instance, do not refuse to hire or delay a return of an individual simply because of these factors.
- ❖ If an individual requests an accommodation, treat as with a usual accommodation request (including requesting documentation), but understand that ability to obtain medical documentation may be delayed.
- ❖ If possible, do not wait and begin accommodation process (i.e., the interactive process) before the employee returns.

Return to Work Issues

- ❖ What if an employee expresses fear about returning because of an underlying condition?
 - ❖ Engage in reasonable accommodation interactive process, but be flexible with documentation
 - ❖ If no reasonable accommodation exists, consider whether the employee qualifies for paid sick under the FFCRA, FMLA leave, or another leave of absence

Return to Work Issues

- ❖ What if an employee wants to stay home to care for an at-risk relative?
 - ❖ Consider whether the family member has a “serious health condition” for FMLA leave
- ❖ What if an employee needs to stay home to care for a student whose school or daycare is closed?
 - ❖ Extended FMLA

Other Considerations

- ❖ Develop an Exposure Control Plan if/when employees are positive for COVID-19, including considering:
 - ❖ Quarantine
 - ❖ Tracing
 - ❖ Cleaning
- ❖ OSHA reporting protocols for workplace injuries
- ❖ Hazard Pay
- ❖ If truly separating employees, pay accrued vacation/PTO
 - ❖ Required in Illinois if true separation from employment

Thank you!

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