

## Congress is Primed to Pass Bill Providing 12 Weeks Of Paid Leave for Covid-19

March 16, 2020

As the coronavirus or COVID-19 continues to shutter businesses and cause employees to stay home, the federal government is working on a bill that could provide up to 12-weeks of paid leave to employees working for small and medium sized businesses.

In its current form (as of 11:45 p.m. on March 13), the “**Families First Coronavirus Response Act**” or “**FFCRA**” (H.R. 6201) would amend the FMLA to allow for leave for absences related to the COVID-19 outbreak – called “**Public Health Emergency Leave.**” It also provides for two weeks (80 hours) of “**Emergency Paid Sick Leave**” (or “Emergency PSL”). Together, the provisions would allow an employee affected by COVID-19 to take up to 12 weeks of paid leave.

A few important caveats:

- First, *the bill is not yet law.*
- Second, because it is not law, it is very possible that *the law could be changed.* We will keep you informed of any subsequent developments regarding the FFCRA (H.R. 6201).
- Finally, while the bill provides some information, there are too many unknowns to give affirmative advice on every issue. Again, we will provide additional details as they become available.

Notwithstanding these caveats, provided below is a list of Frequently Asked Questions (“FAQs”) regarding the FFCRA in order to help employers understand and prepare for a FFCRA.

### FAQ: What is the status of the bill (H.R. 6201)?

As of March 15, the bill has passed the House and will be heard by the Senate this coming week. According to news reports, the bill that passed in the House was a compromise that was negotiated by House Majority Leader Nancy Pelosi, Senate Majority Leader Mitch McConnell, and President Trump.

President Trump tweeted his support of the bill on March 13, so it is likely that the Republican-controlled Senate will also pass the bill. It is possible, however, that the Senate will make changes to the bill, which will then require additional work (via a conference committee) to hammer out a final bill.

#### **FAQ: What does the FFCRA do?**

In its current form, in addition to providing additional funding for food-assistance programs, the FFCRA provides for two types of paid leave:

- **12 Weeks (10 Paid) of Public Health Emergency Leave**—The FFCRA would amend the Family and Medical Leave Act (“FMLA”) to provide employees with 12 weeks of Public Health Emergency Leave for employees who need to be absent because of COVID-19 or because they need to care for a family member affected by COVID-19. While the first two weeks of leave are unpaid, the remaining 10 weeks of leave would be paid by the employer at two-third 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.”
- **80 Hours of Emergency PSL**—The FFCRA also requires employers to provide a bank of 80 hours of Emergency PSL for full-time employees to use as a result of absences related to COVID-19. Part-time employees would receive an amount prorated to their regular work schedule.

Taken together, the Public Health Emergency Leave and the Emergency PSL allow for up to **12 weeks of employer-paid leave** (i.e., 80 hours of Emergency PSL + 10 weeks of Public Health Emergency Leave).

Importantly, as explained in an FAQ below, the FFCRA currently includes tax deductions and credits that are designed to fully compensate the employer for any funds expended pursuant to the bill. As Treasury Secretary Steven Mnuchin stated on March 14, “100% of the cost” for the paid leaves provided for in the bill will be paid for by the federal government via tax credits.

#### **FAQ: What Employers Would Be Covered by the FFCRA?**

If the FFCRA becomes law, it would apply to *all* business with **500 or fewer employees**. This is true with respect to both Emergency PSL and Public Health Emergency Leave.

As to Public Health Emergency Leave, 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 Public Health Emergency Leave – namely, an employer with “fewer than 500 employees.”

In addition, 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 Public Health Emergency Leave to any employee “who has been employed for at least *30 calendar days*.”

Finally, as to Public Health Emergency Leave, the FFCRA does provide the Department of Labor with the regulatory authority to exempt businesses with fewer than 50 employees from the leave requirement if it is determined that “imposition of such requirements would jeopardize the viability of the business as a going concern.”

**FAQ: Can an employee use Public Health Emergency Leave or Emergency PSL if their child’s school or daycare is closed?**

Yes, in its current form, the FFCRA would allow employees to take Emergency PSL and/or Public Health Emergency Leave if their child’s school is closed:

- **Public Health Emergency Leave**—The leave is available for employees who need to be absent from work in order “[t]o 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.”
- **Emergency PSL**—The leave is available for employees who need time off “[t]o care for the child of such employee if the school or place of care has been closed, or the child care provider of such child is unavailable, due to coronavirus.”

**FAQ: Would the FFCRA Apply to Employers with a CBA?**

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

In fact, the bill specifically provides that employers who are signatory to a multiemployer are permitted to satisfy their paid leave obligations under the FFCRA by making contributions to a multi-employer fund, plan, or program. The bill 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.

**FAQ: When would I need to provide Emergency PSL under the FFCRA?**

In its current form, the paid leave provisions of the FFCRA are temporary. They would go into effect *15 days* after the President signs the bill into law and they would be available until *December 31, 2020*.

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

Employees who are laid off before the FFCRA is passed would not be entitled to Paid Sick Leave or Public Health Emergency Leave under the bill. Even after the law is passed, the paid leave provisions would not kick in for 15 days, so it is unlikely (although not known) that such employees would be eligible for leave.

If the FFCRA becomes law in its current form, there is a question of whether an employee who requested Public Health Emergency Leave could continue to be eligible for leave after the employee's jobsite is closed (either due to COVID-19 or because the work was completed). This is because, under current law, the FMLA makes 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, as it currently stands, an employee whose position is eliminated while on leave is not entitled to continue the leave or be reinstated to their position.

Nevertheless, it is unclear from the current bill whether the current FMLA standard regarding layoffs/position eliminations would also apply to employees taking Public Health Emergency Leave. We would anticipate receiving additional guidance from the Department of Labor regarding this issue in the event that the FFCRA passes in its current form.

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

#### **FAQ: How does my company get reimbursed by the IRS?**

With respect to Paid Sick Leave, the bill provides:

In the case of an employer, 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.

As to Public Health Emergency Leave, the bill provides:

In the case of an employer, 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.

#### **FAQ: How do I pay for leave if my business is having cash-flow issues?**

During the news conference on March 14, Treasury Secretary Steven Mnuchin specifically addressed the issue of employers with "cash flow issues." Secretary Mnuchin stated that the Treasury Department will be issuing guidance allowing companies to ***get the money in advance*** from the IRS:

The first thing that this does is that it creates a very seamless process for people who work for small to medium size businesses. They will continue to get paid by their employer. They don't have to worry about big government and coming to big government to get their checks – they will continue to get paid.

We were also very sensitive to small and medium size businesses. Many of these businesses covered sick pay. But, they are going to have many more people that may be on quarantine then normal sick pay, and we didn't want them to have to bear the cost. ***So, 100% of the costs for these limited situations will be taken care of by the federal government.***

And then, finally, we wanted to think of how we could deliver money to people in the quickest way. We didn't want to take six months to implement some government system. So I want to thank everyone at the IRS. The way we're able to do this is that the IRS will issue ***tax credits*** – for most employers will just deduct what they owe us. But 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.***

The press conference is available here: <https://www.youtube.com/watch?v=TvHD1Jcx54w>.

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 (but not 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."

#### **FAQ: Who do I contact with additional questions?**

If you have questions about the FFCRA or any other proposed legislation, please contact Grant Collins at [gcollins@felhaber.com](mailto:gcollins@felhaber.com) or 612-373-8519.