The new paid sick leave and FMLA leave in the Families First Response Act (FFCRA) (updated September 15, 2020).

1. What is this law?

A. The FFCRA is the second bill to respond to the COVID-19 pandemic. It was passed by Congress with overwhelming support and signed into law by President Trump on March 18, 2020 (P.L 116-127). This bill created (1) a new requirement for paid sick leave for workers affected by the COVID-19 crisis and (2) a new requirement for paid leave under the FMLA (Family Medical and Leave Act). The new provisions go into effect April 1 and last until December 31, 2020. This Q&A is designed to help answer questions about the new paid leave requirements and is accurate as of Sunday, March 29. Here is the link to the DOL website Q&A, which has more detail. And here is the link to the original regulation:

9/15/2020: This update includes the revisions effective September 16, 2020 (in bold). Here is the link to the revised regulation.

The revisions (see paragraphs 5, 6, 10, 14, 17) explain which employees are considered "health care providers" and therefore able to be excluded from the paid leave provisions, and a minor clarification for when the employee should give notice. There were no other major changes to the original regulation.

FMLA

2. What is the FMLA paid leave provision?

A. An employee who has been employed by their employer for 30 calendar days may take *paid* FMLA leave if the employee is *unable* to work or telework because the employee is caring for a child under 18 years of age because the child's school or child care has been closed as a result of a public health emergency declared by a governmental authority related specifically to COVID-19. This new leave is available for a total of 12 weeks with the first 10 days unpaid. The employee can substitute other accrued paid time-off for the unpaid portion (including using the new paid sick leave provisions discussed after this section on FMLA).

3. Which employers are required to provide paid FMLA, and are there any exemptions/exclusions?

A. Employers with fewer than 500 employees are required ("covered employers") to provide this paid FMLA leave. However, covered employers in the healthcare field and employers with fewer than 50 employees may exempt their employees from coverage.

To determine if you have under 500 (and under 50) employees, Sec. 826.40(a) of the regulation requires you to include in your count: all currently employed FT or PT employees; all employees on leave; all employees from temp agencies; all joint employees. The regulation explains how to count employees of organizations with ownership interest in eachother. If you are part of a larger organization, or the parent company, it is essential that you review these requirements to determine your eligibility.

4. I understand that covered employers must post a notice to their employees. Please elaborate!

A. Covered employers are required to post a notice for their employees in a conspicuous location informing the employees of these new paid leave provisions. DOL has a notice on its website that you can use.

Sec. 826.40(b) specifically requires employers taking the small business exemption to post the notice. The regulation and commentary do not address whether covered employers that choose to exempt all or some of their employers under the health care provider exception/exclusion/exemption must post. LeadingAge asked DOL this question, and a DOL representative, in a telephone conversation, stated that the employer is still considered "covered" and still must post. The DOL representative acknowledged that the employee notice provided by the Department does not explain either the small business nor the health care exemptions/exclusions and did not have a specific recommendation for employers to address how to inform their employees if they are taking these exemption.

5. NEW: Please explain the "health care provider" exclusion as amended effective September 16, 2020. Which employees are nursing homes, home health agencies, etc. required to provide the 12 weeks of FMLA because the employee is caring for a child home from school?

A. The revised regulation provides employers may exempt only those employees that are considered "health care providers" from the paid leave provision. Other employees of the organization cannot be exempted and the employer is required to provide leave pursuant to these regulations and FFCRA. See Q. 57 on the DOL website Q&A.

As noted, the term "health care provider" refers to the employee, not the employer. The regulation identifies businesses that typically employ health care providers to include nursing facilities and nursing homes, retirement facilities, home health care providers and other similar entities that employ persons who provide health care services.

We believe that although assisted living is not specified, it is probably included in the catch-all at the end. However, employees of independent senior living whether stand-alone or part of retirement communities, and including HUD subsidized housing, do not appear to meet the "health care" requirements to be considered exempt.

The revised regulation goes into detail on what types of employees are considered health care providers and what types are not.

Generally, employees who provide preventive services, treatment, and services that are "integrated with and necessary to diagnostic, preventive or treatment services" are considered health care providers who may be exempted.

In addition to the obvious employees – doctors, registered and licensed nurses, certified nurse aides, lab techs – there is language in the rule that could apply to non-professional staff such as "dining assistants". Examples of services that are "integrated and necessary" include "bathing, dressing, hand feeding, taking vital signs, setting medical equipment for procedures, and transporting patients and samples."

Importantly, employees who are *not* health care providers include *but are not limited* to IT professionals, building maintenance staff, human resources personnel, cooks, food service workers,

records managers, consultants and billers. These are considered "too attenuated to be integrated and necessary components of patient care." Sec. 826.30©(1)(ii)(C).

6. NEW: What if I want to include my *exempt* employees in the new paid sick leave provision that is described below but not in the expanded family and medical leave provision?

A. It appears possible to pick and choose how to implement the leave policies for excluded employees. The regulation does not specifically address this but reiterates the advice given in its original Q&A, in the commentary to the rule at page 35, "To minimize the spread of COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers and emergency responders from the provisions of the FFCRA." As usual, we cannot offer legal advice how to implement these new laws, and strongly recommend that you consult with your corporate counsel or outside employment counsel to make sure you are following the law appropriately.

7. I have fewer than 50 employees and want to be exempt from providing the new paid leave and FMLA provisions. What do I have to do?

A. Sec. 826.40(b) provides that the employer must determine essentially that allowing for leave would (1) cause the small business "to cease operating at a minimal capacity because expenses and financial obligations exceed available business revenues"; absence of the employee(s) would "entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities"; or there aren't enough workers available to work if leave is taken.

The employer does not notify or send any information to DOL. Rather, the employer is directed to maintain its own records to justify claiming the exemption (apparently leaving it up to the employer to inform its employees that it is operating under the exemption and not providing leave under the FFCRA).

This exemption is available to all types of employers, so small housing providers would qualify.

As noted above, the regulation specifically requires the employer to post the required notice to employees even if it chooses to be exempt.

8. How does the paid FMLA requirement intersect with unpaid FMLA?

A. The total annual time available for FMLA has not changed; it is still 12 weeks. The new requirement adds a new criterion -- time off because the employee cannot work because they are caring for a child home from school to the other available reasons for taking FMLA. DOL has indicated that for FMLA, an employee could choose to take FMLA under paid sick leave and then apply the 10 days to the 10 days unpaid leave provided in the FMLA expansion. But the employee won't get any additional leave if the employee chooses this option.

9. Are there restrictions on the rate of pay for employees taking this new FMLA benefit?

A. The employee is entitled to 2/3d their regular pay rate. The total daily rate maxes out at $200, or $10,000 total (reflecting $200 times 5 days times 10 weeks paid leave). And just to clarify, employees are only entitled to 10 weeks paid at 2/3d their own salary, not $10,000.

10. NEW: Is the employee required to give notice before taking FMLA?

A. **The revised rule clarifies notice requirements. It provides that notice must be given as soon as practicable but does not set up any specific requirements. The type of notice has not changed – see Q. 23, below.**

11. I understand that the federal government will cover the cost of paid FMLA leave. How will that work?

A. Basically the new law provides for tax credits through the employer's contributions to FICA, currently 6.2%. While we are waiting for the Treasury Department to issue guidance or regulations on how this will work, we think it means that the employer will not have to pay its portion of payroll taxes and if this isn't enough to cover the entire cost, the federal government will be refunded as an overpayment. While originally it looked like the employer would have to wait for reimbursement, it looks now like the employer can simply not pay in its quarterly obligation.

Paid Sick Leave:

12. What is in the "paid sick leave" requirement?

A. Employees are entitled to 80 hours of sick leave with no waiting period, paid at their regular rate where the employee is unable to work because the employee is:

1. subject to a federal, state or local quarantine or isolation order based on COVID-19;

2. was advised by a health care provider to self-quarantine because of COVID-19;

3. experiencing symptoms of COVID-19 and seeking medical diagnosis

4. caring for an individual subject to isolation or quarantine, as defined at (1) and (2) above

5. caring for a child because the school or child care provider is closed because of COVID-19 (this is the same provision added to FMLA).

6. experiencing "any other substantially similar condition specified by the Secretary of Health and Human Services…."

13. What employers are required to provide the new paid leave benefits?

A. All employers who have up to 500 employees. An employer with fewer than 50 employees *may* qualify for an exemption from the requirement to provide child care leave if, in the words of the new law, allowing leave would "jeopardize the viability of the business as a going concern."

14. NEW: Does the exemption for "health care providers" discussed under FMLA apply to this 2-week leave as well?

A. Yes. The revised regulation provides employers may exempt only those employees that are considered "health care providers" from the paid leave provision. Other employees of the organization cannot be exempted and the employer is required to provide leave pursuant to these regulations and FFCRA.

As noted, the term "health care provider" refers to the employee, not the employer. The regulation identifies businesses that typically employ health care providers to include nursing facilities and

nursing homes, retirement facilities, home health care providers and other similar entities that employ persons who provide health care services.

We believe that although assisted living is not specified, it is probably included in the catch-all at the end. However, employees of independent senior living whether stand-alone or part of retirement communities, and including HUD subsidized housing, do not appear to meet the "health care" requirements to be considered exempt.

The revised regulation goes into detail on what types of employees are considered health care providers and what types are not.

Generally, employees who provide preventive services, treatment, and services that are "integrated with and necessary to diagnostic, preventive or treatment services" are considered health care providers who may be exempted.

In addition to the obvious employees – doctors, registered and licensed nurses, certified nurse aides, lab techs – there is language in the rule that could apply to non-professional staff such as "dining assistants". Examples of services that are "integrated and necessary" include "bathing, dressing, hand feeding, taking vital signs, setting medical equipment for procedures, and transporting patients and samples."

Importantly, employees who are not health care providers include but are not limited to IT professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants and billers. These are considered "too attenuated to be integrated and necessary components of patient care." Sec. 826.30©(1)(ii)(C).

15. What if I want to include my *exempt* employees in the new paid sick leave provision that is described below but not in the expanded family and medical leave provision?

A. The ability to pick and choose appears to be possible. In the commentary to the regulation, as in the Q&A, the agency says, at the end of the paragraph explaining which employees may be exempt as health care providers, "To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt healthcare providers from the provisions of the FFCRA." (emphasis added). As usual, we cannot offer legal advice how to implement these new laws, and strongly recommend that you consult with your corporate counsel or outside employment counsel to make sure you are following the law appropriately.

16. Does the leave have to be taken all at once? And does it carry over past the end date, 12/31/2020?

A. No, the leave does not have to be taken all at once and any leave remaining does not carry over. The right to paid sick leave ends when the reasons it is available are no longer applicable (i.e., employee does not need for COVID-19). And remember, the paid leave is only available for COVID-19 reasons (except for that unclear "catch all" category).

17. NEW: Does the employee have to give notice before taking leave?

A. **The employee is not required to give notice in advance for either type of leave, but after the first day of leave the regulation states that it would be reasonable for the employer to require the**

employee to follow "reasonable notice" requirements to continue receiving paid sick leave. See Q. 23, below.

18. How is the rate of pay calculated?

A. The employee is entitled to leave at their regular pay rate, except that the max per day is $511, with a max of $5110 for reasons related to leave based on quarantine/isolation and diagnosis. Employees who take leave to care for a quarantined individual, to care for a child because school has been closed, or because they are experiencing symptoms similar to COVID-19 will receive 2/3 of their regular pay, or max of $200 per day and $2000 aggregate.

19. I understand that the federal government will cover the costs of this new paid sick leave requirement. How will that work?

A. Reimbursement is available by excusing the employer's payroll tax obligation, as noted above in our explanation of FMLA coverage.

20. Are there any special rules regarding how the two new paid leave policies interact?

A. The Department of Labor is given the authority to issue regulations that exclude health care provider employees as noted above; that exempt small businesses as noted above; and "as necessary, to carry out the purposes of this Act, including to ensure consistency between the paid sick leave and FMLA provisions and tax credit application." The regulations confirm that for FMLA, an employee could choose to take FMLA under paid sick leave and then apply the 10 days to the 10 days unpaid leave provided in the FMLA expansion. But the employee won't get any additional leave if the employee chooses this option.

21. OBSOLETE Q. I understand that DOL was not enforcing the new paid sick leave and extended FMLA laws for 30 days? Is this true!?

Yes. https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1. The Department of Labor advised that it would not enforce for 30 days but started the 30 days from the day the bill was signed into law, March 18, and so the 30 days ends April 17. Here is the way DOL will address violations:

The Department will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e. March 18 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.[3]

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.

4. We have not heard if this non-enforcement was in fact implemented but it would only have been in effect through April 17.

22. What records must the employer retain?

A. The Department of Labor requirement, set out in Q. 15 of DOL's Q&A, states:

Regardless of whether you grant or deny a request for paid sick leave or expanded family and medical leave, you must document the following:

The name of your employee requesting leave;
The date(s) for which leave is requested;
The reason for leave; and
A statement from the employee that he or she is unable to work because of the reason.

If your employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If your employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally document the name of the health care provider who gave advice.

If your employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you must also document:

The name of the child being cared for;
The name of the school, place of care, or child care provider that has closed or become unavailable; and
A statement from the employee that no other suitable person is available to care for the child.

Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

23. What information is my employee expected to provide when asking for leave?

A. The DOL Q&A, Q. 16, provides that the employee "must provide your employer either orally or in writing the following information:

Your name;
The date(s) for which you request leave;
The reason for leave; and

A statement that you are unable to work because of the above reason.

If the employee requests leave because they are subject to a quarantine or isolation order or to care for an individual subject to such an order, the employee should additionally provide the name of the government entity that issued the order. If the employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, the employee should additionally provide the name of the health care provider who gave this advice.

If the employee requests leave to care for a child whose school or place of care is closed, or child care provider is unavailable, the employee must also provide:

The name of their child;
The name of the school, place of care, or child care provider that has closed or become unavailable; and
A statement that no other suitable person is available to care for their child.

In addition to the above information, the employee must also provide to your employer written documentation in support of your paid sick leave as specified in applicable IRS forms, instructions, and information.

Note that all existing certification requirements under the FMLA remain in effect if the employee is taking leave for one of the existing qualifying reasons under the FMLA. For example, if the employee is taking leave beyond the two weeks of emergency paid sick leave because their medical condition for COVID-19-related reasons rises to the level of a serious health condition, the employee must continue to provide medical certifications under the FMLA if required by the employer.