

UPDATE REGARDING FAMILIES FIRST CORONAVIRUS RESPONSE ACT

This is an update regarding paid leave under the Families First Coronavirus Response Act (the "Act"), and includes the Emergency Paid Sick Leave Act and expands the Family and Medical Leave Act, which were addressed in an earlier Notice. The Act goes into effect on **Wednesday, April 1, 2020**.

The Department of Labor ("DOL") and IRS have issued some additional guidance to clarify some commonly asked questions regarding the Act.

Contrary to previous statements and guidance, the IRS has now indicated the tax credits for employers apply to qualified sick leave wages and qualified family leave wages paid for the period from **April 1, 2020 to December 31, 2020 only**. We had expected and hoped that credits would be permitted for emergency leave granted between the enactment date of March 18 and April 1. If an employer already provided paid leave as a result of the pandemic prior to April 1, that leave would almost certainly have been required under the Michigan Paid Medical Leave anyway due to the declared "public health emergency." Accordingly, any paid leave already provided should be reclassified and counted against the employees' available sick time/PTO. Beginning April 1, employers can utilize the tax credits for any federally mandated paid leave under the Act.

Required Compliance with the Act

While the Act goes into effect on April 1, the DOL will observe a **temporary period of non-enforcement of the Act**, to enable employers who are covered by the Act to come into compliance with the new law. The DOL 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 Act (**i.e., through April 17, 2020**), provided that the employer has made reasonable, good faith efforts to comply with the Act.

"Reasonable" and "good faith" means: (1) remedying any violations to make employees whole who are owed paid leave under the Act and (2) that the violations are not willful or made with reckless disregard for the Act provisions. There is also a requirement that employers submit a written statement to the DOL that they will comply with the Act in the future.

Application of Paid Leave during Business Closures or Layoffs

Under the Governor's executive "Stay At Home" order, businesses that have closed are not required to pay leave to employees under the Act. According to the DOL's recent guidance, employees do not receive, or continue to receive, paid leave under the Act if their worksite closes due to lack of business or pursuant to a federal, state or local directive. This is the case regardless of whether the closure occurred before or after April 1, 2020 (when the law takes effect), whether the closure is temporary, or whether the employee is on leave when the closure occurs. Workers affected by these circumstances should apply for unemployment benefits.

Clarification on Exemption for Businesses with Fewer Than 50 Employees

The Act created some exemptions for small businesses (those with fewer than 50 employees) for whom the "imposition of such requirements would jeopardize the viability of the business as a going concern."

The DOL has now published the following Q&A about the small business exemption.

When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. 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.

Please **note the small business exemption only applies to paid leave requirements due to school closure or for child care**, not the other criteria for paid leave under the Act, as set forth in our previous Notice. In those cases, the employer must pay the employee for leave under the Act.

Additional Q&A from the DOL can be found here: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

This memo is intended only as a general overview. If you have any questions or would like legal advice regarding the Families First Coronavirus Response Act, or any other employment issue, please contact [David Lawrence](#), [Sarah Gidley](#) or [Stacey DiDomenico](#).