Coates' Canons Blog: How the Paid Sick Leave Provisions of the Families First Coronavirus Response Act Affect Government Employers

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On March 18, 2020, Congress passed and the President signed into law the Families First Coronavirus Response Act (the "Families First Act"). The Families First Act is actually a compilation of a number of different acts with different purposes, all sharing the goal of providing relief to those who have been or will be adversely affected economically by the COVID-19 pandemic. The Families First Act has three provisions that will be of interest to North Carolina government employers. *The first* is the Emergency Family and Medical Leave Expansion Act, which provides a time-limited expansion of the job-protection benefits under the Family and Medical Leave Act (FMLA) and mandates, for the first time, paid leave under the FMLA. *The second* is the Emergency Paid Sick Leave Act, which requires employers to provide paid sick leave to employees who have been advised to self-isolate or self-quarantine, are seeking a diagnosis of COVID-19 symptoms, or are caring for an individual under isolation or quarantine or for children whose normal caregivers are unavailable due to the COVID-19 precautions. Both of these acts surprisingly allow individual employers to exclude from coverage healthcare providers and emergency responders. *The third* is Division G of the Families First Act, which provides payroll tax relief for sick leave pay required under the Act. To learn more about these three sections of the Families First Act and how they fit together, read on.

BACKGROUND

The Family and Medical Leave Act

The regular, familiar Family and Medical Leave Act (FMLA) requires employers to grant eligible employees a total of twelve workweeks of job-protected, unpaid leave during any twelve-month period because the employee needs to care for a spouse, child, or parent with a **serious health *condition***, or because of the employee's own ***serious health condition*** where the condition makes the employee unable to perform his or her job (the FMLA also covers leave for birth, adoption or foster placement of a child). Thus, the purpose of the FMLA is to give employees a reasonable, but limited, amount of time in which to take care of their own or a family member's health issues without losing their job.

Serious Health Condition

FMLA leave must be granted for a serious health condition of an employee or of an employee's family member. A serious health condition is defined as an illness, injury or impairment, or physical or mental condition that involves

- any period of incapacity or treatment connected with inpatient care;
- any period of incapacity requiring an absence of more than three calendar days from work that also involves treatment two or more times by a healthcare provider within the first thirty days of incapacity or a regimen of continuing treatment under the supervision of a healthcare provider;
- any period of incapacity due to pregnancy;
- any period of incapacity or treatment due to a chronic health condition such as asthma, diabetes, or epilepsy;
- any period of incapacity that is long-term or permanent due to a condition for which treatment may not be effective (e.g., cancer; AIDS), or
- any absence to receive multiple treatments (and to recover from the treatments) for a condition that would likely result in an incapacity for more than three consecutive days if left untreated (e.g., physical therapy, chemotherapy, dialysis).

FMLA leave is unpaid leave, but an employer may require (or an employee may choose) to run accrued paid leave or accrued overtime compensatory time off along side the FMLA leave to turn it into a paid leave.

Paid Sick Leave

Employer-provided sick leave, in contrast to FMLA leave, can be defined however an employer chooses because it is a benefit that is not required by law. Most local government employers make sick leave available for any illness or injury that prevents an employee from performing his or her regular job duties, as well as for medical or dental appointments. Other approved reasons for using sick leave might include pregnancy-related conditions or care of a sick child. Unlike FMLA leave, sick leave is not job-protected leave. Where the FMLA does not apply, an employer may terminate an employee for excessive absenteeism even if the employee is genuinely ill and has accrued sick leave upon which to draw.

The State Human Resources Act (SHRA) is the sole exception to this rule. Under SHRA rules local government employees covered by the SHRA (that is, county social services and health department employees – except those in consolidated human services agencies –, emergency management employees, and employees of area mental health authorities and of district health authorities) may be separated from service because they are unable to work only after they have exhausted all available leave.

THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

New FMLA Qualifying Reason: Lack of Child Care Due to COVID-19

The new Emergency Family and Medical Leave Expansion Act ("Emergency FMLA Act") adds a new category of qualifying reasons for the employee to take job-protected leave to the FMLA, in addition to the original leave for the employee's own or a family member's serious health condition and the birth, adoption or foster care placement of a child. Now, up to twelve weeks of leave may be taken under this new qualifying reason ("emergency FMLA leave") when

> an 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 an emergency with respect to COVID-19 as declared by a federal, state or local authority.

Two definitions are crucial for understanding the scope of this benefit. The first is the definition of "son or daughter." The FFCRA uses the same definition of "son or daughter" as is used by regular FMLA. *See* 29 CFR § 826.10(a).
The second is the definition of "child care provider." The Emergency FMLA Act defines "child care provider" as one who provides child care services on a regular basis and *receives compensation* for those services. It excludes the situation where a family member has been providing child care and is no longer available. *See* section 3102(b) of the Families First Act. In the regulations implementing the FFCRA, however, DOL has defined "child care provider" in the exactly the same way for both emergency FMLA and emergency paid sick leave purposes to reduce confusion. It has defined "child care provider" to include family members and friends who are not licensed or registered under state law who regularly care for an employee's child, even if they do so without compensation. *See* 29 CFR § 826.10(a).

This new provision applies to any employee who has worked for at least 30 days. This is much more generous coverage than the provisions for regular FMLA provide. Employees are not eligible for regular FMLA leave until they have worked for their employer for twelve nonconsecutive calendar months and for a minimum of 1,250 hours in the immediately preceding calendar year. This new act does not change the eligibility requirements for regular FMLA leave. An employee infected with COVID-19 does not qualify for regular FMLA leave for a serious health condition unless they work for an employer with 50 or more employees and have worked for that employer for twelve months and 1,250 hours.

Employees are still limited to a total of twelve weeks of FMLA leave within a 12-month period for all reasons combined. Employees who have already used up their FMLA allotment for the year are not entitled to emergency FMLA leave. *See* 29 CFR § 826.70(a)-(c). And note that employees may only take a single entitlement of emergency FMLA leave even where the employee's use of emergency FMLA leave spans the end of one FMLA year and the beginning of another. If at the end of an employee's FMLA year, he or she has used only six of the possible weeks of emergency FMLA leave, the employee may only take six weeks of emergency FMLA leave in the next FMLA leave. This is different from regular FMLA leave where an employee's annual twelve week entitlement begins anew at the start of the FMLA year and an employee

may, if qualified, stack twelve weeks of FMLA leave at the start of a new FMLA year on top of twelve weeks of FMLA leave taken at the very end of the preceding year. *See* 29 CFR § 826.70(e).

As with regular FMLA leave, where the need for leave is foreseeable, employees must give their employers as much advance notice as practicable.

Note that only employees for whom the employer has work – whether it is work at the employee's regular workplace or remote work (telework) – are eligible for emergency FMLA leave. If an employee has been directed to remain at home and there is no work that can be performed from home, the employee will not be eligible for emergency FMLA leave even if he or she would be unable to work because of school closures or the unavailability of their regular child care provider. This is true whether or not the employer has formally furloughed employees. *See* 29 CFR §§ 826.10(a) and 826.20(a).

Time Limited Provision

Emergency FMLA leave is available only for as long as a federal, state or local COVID-19 state of emergency is in effect and in any event only through December 31, 2020.

Major New Benefit: After 10 Days, Emergency FMLA Leave is Paid Leave

Under the Emergency FMLA Act, leave taken when an employee loses childcare due to the COVID-19 emergency is paid leave after a ten-day waiting period. The first ten days of emergency FMLA leave are unpaid, just as regular FMLA leave is. An employee may choose to use any accrued paid leave during the first ten days of emergency FMLA leave. Interestingly, the Emergency FMLA Act does not have a provision allowing the employer to require that the employee use any accrued paid leave during this period, as do the regular FMLA regulations. Employers should not, therefore, require employees using emergency FMLA leave to use their accrued paid leave during the first 10 days. Employers may, however, continue to require employees who are on FMLA leave for a serious health condition related to COVID-19 to use accrued leave, including accrued compensatory time off ("comp time"), at the same time.

After the first 10 days, emergency FMLA leave becomes paid leave. The Emergency FMLA Act says that the rate of pay should be calculated by multiplying the number of hours the employee would normally be scheduled to work each week by an amount that is "*not less than two-thirds* of an employee's average regular rate of pay," as that term is used by the Fair Labor Standards Act. Of course, under the FLSA, only nonexempt employees have a regular rate of pay. The Emergency FMLA Act does not say how to calculate the rate of pay for exempt employees. Unless and until there is guidance that says otherwise, the best way to calculate the paid leave rate for exempt employees would be to calculate a pro-rata hourly rate from their salary and multiply a number that is not less than two-thirds of that amount by their the number of hours in their stated schedule for a "normal" workweek.

DOL's FFCRA regulations allow an employee to chose or an employer to require that accrued paid leave run concurrently with emergency FMLA leave. *See* 29 CFR § 826.160(c).

Employees with Fluctuating Workweeks

The Emergency FMLA Act says that where an employer cannot be sure how many hours an employee would have worked each week because the employee's work schedule varied greatly from week to week, the employer should calculate the average number of hours that the employee was scheduled for over the six-month period preceding the day on which emergency FMLA leave began, including any days in which the employee was on leave of any kind.

Limitation on the Total Amount of Paid Emergency FMLA Leave

For each employee entitled to paid emergency FMLA leave, the maximum amount of an employer may be required to pay is $200 per day or $10,000 in total.

Potential Exclusion of Healthcare Workers and Emergency Responders
One surprising provision allows employers to exclude healthcare providers or emergency responders from coverage for emergency FMLA leave. *See* section 3105 of the Families First Act. The Act itself does not define emergency responders, but the U.S. Department of Labor has defined the term broadly in its final FFCRA regulations:

> . . . ***an emergency responder is anyone necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or or others needed for the response to COVID-19***

> . ***This includes but is not limited to*** military or national guard, ***law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel***, *and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency* as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19 [emphasis added].

See 29 CFR § 826.30(c)(2).

The Emergency FMLA Act Applies to All Government Employers

The Emergency FMLA Act applies to all government employers without exception. The regular FMLA defines "employer" to include "any public agency," which is elsewhere defined to include any state or political subdivision thereof. The *employer threshold* requirements in both the regular FMLA provisions and the emergency FMLA provisions apply only to private-sector employers. Under the regular provisions of the FMLA, an *individual employee* is eligible for FMLA leave only if they work for an employer with 50 or more employees within a 75-mile radius of that employee's worksite (that has the admittedly strange effect of making government employers with fewer than 50 employees covered employers who will have no eligible employees). That limitation does not apply to emergency FMLA leave. It must be offered to any employee who has been on the payroll for 30 days regardless of number of employees the government employer has.

EMERGENCY PAID SICK LEAVE ACT

The Emergency Paid Sick Leave Act (the "Sick Leave Act") is separate from and independent of the Emergency FMLA Act. It is located in Division E, sections 5101 – 5111 of the Families First Act. The purpose of the Sick Leave Act appears to be to encourage employees to observe the terms of a isolation or quarantine order by removing the fear of lost income, to keep employers from firing those who must stay home because of COVID-19 circumstances, and in the short-term, to keep money in people's pockets for food and housing.

Which Employers Must Provide Emergency Paid Sick Leave?

The Sick Leave Act applies to all government employers without exception.

Who Gets Emergency Paid Sick Leave?

A broad group of people will qualify for emergency paid sick leave. ***All*** government employers and employees are covered by the Sick Leave Act. There are no size or length of service requirements. The circumstances under which employees will qualify for emergency paid sick leave are:

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 their healthcare provider to self-quarantine because they are infected with or have been exposed to COVID-19 or because they are at high risk of complications from COVID-19;
3. The employee is showing symptoms of COVID-19 and is seeking but has not yet received a medical diagnosis;
4. The employee is caring for someone subject to a federal, state or local quarantine or isolation order related to COVID-19 or who has been advised by their healthcare provider to self-quarantine for COVID-19 related reasons; or
5. The employee is caring for his or her son or daughter because the child's school or childcare facility has been closed or the childcare provider is no longer available because of a COVID-19 related reason.

Only employees for whom the employer has work – whether it is work at the employee's regular workplace or remote work (telework) – are eligible for emergency paid sick leave. If an employee has been directed to remain at home and there is no work that can be performed from home, the employee will not be eligible for emergency paid sick leave even if he or she meets one of the qualifying conditions for sick leave. This is true whether or not the employer has formally furloughed employees. *See* 29 CFR §§ 826.10(a) and 826.20(a).

For the purposes of reasons #1 and #4, the FFCRA final regulations include a broad definition of the term "subject to a quarantine or isolation order." That term now includes not only formal public health orders for the quarantine or isolation of individuals, but federal, state and local stay-at-home and shelter-in-place orders, as well, when the effect of a stay-at-home order is to make an employee unable to work (because they cannot get to work) even though their employer has work for them to do. *See* 29 CFR § 826.10(a).

Note that the last reason is similar to the additional qualifying reason for FMLA leave provided by the Emergency FMLA Act. The FFCRA uses the same definition of "son or daughter" as is used by regular FMLA. *See* 29 CFR § 826.10(a). There are other potential overlaps with FMLA for a serious health condition, which will be discussed below.

As under the regular FMLA, employers are permitted to make compliance with the employer's regular sick leave reporting procedures a condition of the continued receipt of emergency paid sick leave benefits.

Employers may not fire or take any other retaliatory action against an employee who exercises their right to emergency paid sick leave.

How Much Paid Sick Leave Will Employers Have to Provide?

Employees who cannot work for one of the five reasons set forth above are entitled to a maximum of 80 hours of paid sick leave if they are full-time employees. If one assumes that 40 hours of work is a full-time work schedule, then the amount of sick leave qualifying employees must be given is equal to two weeks' worth. This makes sense given that the standard self-quarantine period following exposure to an infected person is two weeks (fourteen days). Part-time employees are also entitled to paid sick leave in an amount equal to the average number of hours that they work over a two-week period. Employees become eligible for emergency paid sick leave as soon as they need it. There is no 10-day waiting period as under the Emergency FMLA Act.

The Sick Leave Act does not define the terms "full-time" and "part-time," but in the final FFCRA regulations, US DOL defines full-time as someone who regularly works 40 per week and part-time as someone who works fewer than 40 hours per week. See 29 CFR §§ 826.21(a)(1)-(2) and (b)(1).

Emergency paid sick leave is independent of any sick leave that an employer grants employees in the normal course of business. The Sick Leave Act expressly prohibits employers from requiring employees to use ordinary accrued paid leave before using emergency paid sick leave.

Employers are also prohibited from requiring employees to look for or find a substitute before becoming eligible for emergency paid sick leave.

How is the Amount That Employees Must Be Paid in Emergency Paid Sick Leave Calculated?

Calculating emergency paid sick leave is much more complicated than calculating the amount that must to be paid to an employee qualifying for paid emergency FMLA leave.

Different Standards for Different Qualifying Reasons

First of all, there are different standards for those employees needing emergency sick leave for reasons 1, 2 or 3 set forth above (where the employee himself or herself is under isolation or quarantine or is seeking a diagnosis of COVID-19) and those needing emergency sick leave for reasons 4 or 5 (employee is caring for someone else in quarantine or isolation or who has COVID-19 symptoms or must take care of children whose schools are closed or childcare providers are unavailable). Employees needing sick leave for reasons 1, 2 and 3 are entitled to the full amount of emergency paid sick leave, as calculated below, while employees needing sick leave for reasons 4 and 5 are only entitled to two-thirds of the

calculated payment.

Calculating the Amount of Sick Leave Pay

In North Carolina, the starting point for the calculation of the rate of pay for emergency paid sick leave is the employee's average regular rate of pay under the Fair Labor Standards Act multiplied by the number of hours the employee usually works. As noted above, exempt employees do not have a regular rate of pay and, as is the case with the Emergency FMLA Act, the Sick Leave Act does not say how to calculate paid leave for exempt employees. Unless and until there is guidance that says otherwise, the best way to calculate the paid leave rate for exempt employees would be to calculate a pro-rata hourly rate from the employee's salary and multiply a number that is not less than two-thirds of that amount by the number of hours in their stated schedule for a "normal" workweek.

Employees with Fluctuating Workweeks

Like the Emergency FMLA Act, the Sick Leave Act says that where an employer cannot be sure how many hours an employee would have worked each week because the employee's work schedule varied greatly from week to week, the employer should calculate the average number of hours that the employee was scheduled for over the six-month period preceding the day on which emergency FMLA leave began, including any days in which the employee was on leave of any kind.

Limitation on the Total Amount of Emergency Sick Leave Paid Any Individual

For each employee entitled to emergency paid sick leave for reasons 1, 2 or 3, the maximum amount an employer may be required to pay is $511 per day or $5,110 in total. For each employee entitled to emergency paid sick leave for reasons 4 or 5, the maximum amount an employer may be required to pay is $200 per day or $2,000 in total.

Potential Exclusion of Healthcare Workers and Emergency Responders

As with the Emergency FMLA Act, the Sick Leave Act allows employers to exclude healthcare providers or emergency responders from emergency paid sick leave coverage. *See* section 5102(a) of the Families First Act. The Sick Leave Acts also does not define emergency responders, but the U.S. Department of Labor has defined the term broadly in its final FFCRA regulations:

> . . . an emergency responder is anyone necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19 [emphasis added].

See 29 CFR § 826.30(c)(2).

Time Limited Provision

Emergency paid sick leave is available only through December 31, 2020.

WHEN DO THE EMERGENCY FMLA ACT AND THE SICK LEAVE ACT BECOME EFFECTIVE?

The effective date is April 1, 2020.

WHERE THE FMLA, THE EMERGENCY FMLA ACT AND THE SICK LEAVE ACT OVERLAP

The Emergency Paid Sick Leave Act provides job-protected sick leave in situations that may not be covered by the regular Family and Medical Leave Act, such as

- when an employee is under a quarantine order or recommendation for exposure to COVID-19 but is not showing any symptoms of illness;
- when an employee is seeking but does not yet have a diagnosis of COVID-19;
- when an employee is caring for someone who is under a quarantine order or recommendation for exposure to COVID-19 but who is not showing any symptoms of illness or is caring for someone seeking a diagnosis of COVID-19;
- when an employee has COVID-19 but their illness does not qualify as a serious health condition although it renders them unable to work;
- when an employee's childcare provider is unavailable due to COVID-19 related reasons, but that childcare provider is a relative or friend and does not receive compensation for those services, as required under the Emergency FMLA Act.

Despite the fact that the Sick Leave Act seems designed, in part, to cover absences that are not covered by the FMLA, there appear to be several situations in which an employee may be covered by both the Emergency FMLA Act and the Sick Leave Act. They are situations in which the employee is unable to work and:

- the employee's COVID-19 infection qualifies as a serious health condition and the employee is either subject to a quarantine or isolation order or recommendation.
- the employee is caring for an immediate family member whose COVID-19 infection qualifies as a serious health condition and that family member is either subject to a quarantine or isolation order or recommendation;
- the employee must care for minor children whose school is closed and/or whose paid childcare providers are unavailable because of COVID-19 related reasons.

May an employer count emergency paid sick leave against an employee's FMLA entitlement? To be clear, nothing in either the Sick Leave Act or the FMLA prohibits an employer from running FMLA leave concurrently with the paid sick leave required by the Act. An employer may count the time on emergency paid sick leave against the employee's FMLA entitlement so long as the employee either has a serious health condition or is caring for an immediate family member with a serious health condition.

Where an employee qualifies for both paid emergency FMLA leave (that is, after 10 days) and emergency paid sick leave, are they entitled to receive payments under both statutes, effectively double-dipping? Although the Families First Act does not address this question, Congress certainly did not intend this result. In this situation, the statute that provides the employee with the greater benefit should be applied.

Let's consider each of the three situations in which the normal FMLA, the Emergency FMLA Act and the Sick Leave Act might overlap.

Employee Has a COVID-19 Infection That Qualifies as a Serious Health Condition and Is Subject to a Quarantine or Isolation Order or Recommendation

It is not going to be surprising if an employee diagnosed with COVID-19 satisfies the serious health condition requirement for regular FMLA leave (discussed above) and is either ordered to isolate themselves by their local health director or receives a recommendation to isolate themselves from their healthcare provider. (Remember, as my colleague Jill Moore explains in her Coates' Canons blog post *Isolation, Quarantine, and Social Distancing: What's the Difference?*, that while the terms isolation and quarantine are often used together and have similar meanings, there is a key distinction. Isolation is used for people who have known or suspected infections (in other words, they're sick), while quarantine is used for people who are at risk of becoming infected, usually because they have a known or suspected exposure to an infected person. There probably aren't any situations in which an employee with COVID-19 infection that qualifies as a serious health condition would be in quarantine rather than in isolation.)

Under the FMLA, an employee who has a serious health condition and is subject to an isolation order or recommendation may – or the employer may order the employee to – use any accrued paid sick leave that they have available. If the

employee does not have any accrued paid sick leave, the FMLA leave for a serious health condition will be unpaid leave.

The Emergency FMLA Act will not come into play in this situation because it covers only those situations related to a lack of childcare.

The Sick Leave Act will apply here however. Under the Sick Leave Act, the employee will immediately qualify for paid sick leave for 80 hours or approximately two workweeks. This means that the employer should immediately begin paying the employee the amount to which he or she is entitled as calculated under the Sick Leave Act's paid leave calculation provision, discussed above. Since the Sick Leave Act prohibits an employer from requiring that the employee use any accrued paid leave first, the employer must apply emergency paid sick leave first, for the first 80 hours. If at the conclusion of 80 hours, the employee is still unable to return to work and is still suffering from a serious health condition, any other accrued paid leave may be applied to the remainder of the FMLA leave.

But what if, in addition to having a serious health condition, the employee also has a minor child at home because the schools are closed or the employee's paid childcare provider is unavailable due to COVID-19 related reasons? The Emergency FMLA Act doesn't say what happens in this circumstance, but employers should apply the rule generally used by the U.S. Department of Labor, which implements the FMLA, namely, that the employee should be allowed to choose the provision which is of greater benefit to him or her. So an employer should allow an employee who has **both** a serious health condition and a need for emergency FMLA leave to choose whether to apply any "regular" accrued paid leave first or to use paid emergency FMLA leave as calculated under the Emergency FMLA Act first (until the employee reaches the maximum $10,000 in paid emergency sick leave benefits). Whichever form of paid leave the employee chooses, after that form of paid leave runs out, the employer should then apply the other form of leave, as long as the applicable qualifying condition still applies (that is, the employee still has a serious health condition or the employee still cannot work due to the lack of childcare).

Employee Is Caring for an Immediate Family Member With a COVID-19 Infection That Qualifies as a Serious Health Condition and Who Is Subject to a Quarantine or Isolation Order or Recommendation

The analysis here is the same as it is for the situation discussed above where an employee has a COVID-19 infection that satisfies the conditions for FMLA leave for a serious health condition and either has been ordered to isolate themselves or their healthcare provider has recommended that they do so. And remember, the term isolation is used for people who have known or suspected COVID-19 infection (they are sick), while quarantine is used for people who are have been exposed to COVID-19 infection. There probably aren't any situations in which an employee is caring for a family member with a COVID-19 infection that qualifies as a serious health condition who is in quarantine rather than in isolation, although the employee might be in quarantine themselves during and after this period.

Employee Must Care for Minor Children Whose Schools Are Closed and/or Whose Paid Childcare Providers are Unavailable Because of COVID-19 Related Reasons

In this situation, the employee would not have a serious health condition or be caring for an immediate family member with a serious health condition.

For school closures, both the Sick Leave Act and the Emergency FMLA Act provide paid leave. Both Acts calculate an employee's paid sick leave wages in the same way (see above) but they have different maximum daily and aggregate payments. The Sick Leave Act provides paid leave immediately but only for 80 hours of missed work and the maximum amount an employer may be required to pay is $511 per day and $5,110 in total for each employee. The Emergency FMLA Act provides for paid leave only after 10 days and only in an amount of $200 per day and $10,000 total for each employee.

The Sick Leave Act does not require that a child care provider be paid to look after the employee's children. The Emergency FMLA Leave Act, on the other hand, provides leave only where the childcare provider is one who works for wages. The FFCRA gives DOL the authority to issue regulations that ensure consistency between the Emergency FMLA Act and the Emergency Paid Sick Leave Act. Using that authority, DOL has defined child care provider for the purposes of **both** emergency FMLA leave and emergency paid sick leave to include paid providers, as well as family members and friends who regularly look after an employee's child.

For the first 80 hours in which an employee is unable to work because of a COVID-19 related child care issue, the

employee should be provided with paid sick leave under the Sick Leave Act. First of all, the employee will not qualify for emergency FMLA leave until after day 10. The Sick Leave Act provides that an employer may not require an employee to use other paid leave before using emergency paid sick leave and since the Sick Leave Act has a higher daily maximum, it makes sense to continue to use emergency paid sick leave for the full 80 hours before switching the employee over to paid emergency FMLA leave. The final FFCRA regulations expressly allow emergency paid sick leave and the first 10 days of emergency FMLA leave to run concurrently. See 29 CFR § 826.60(a).

EMPLOYERS WILL NOT HAVE TO PAY FICA TAXES ON PAID EMERGENCY FMLA LEAVE OR PAID EMERGENCY SICK LEAVE

There have been some conflicting media reports about whether the Families First Act provides payroll tax relief to government employers. That is because it both does and does not. **Government employers do not have to pay FICA taxes on paid leave wages under both the Emergency FMLA Act and the Emergency Sick Leave Act**. But private employers get a payroll tax credit in the amount of the total paid emergency FMLA leave and emergency paid sick leave wages that they pay that they can use to offset the social security portions of FICA payroll taxes (OASDI taxes) that they pay on all other employees in the tax payment quarter. **Government employers are not eligible to receive these tax credits.** It is unclear why this benefit was not extended to government employers. Perhaps it is in some way related to the fact that private employers pay corporate income taxes while government employers, by definition, do not have earnings or make a “profit.”

The Provisions Explained in Further Detail

The Internal Revenue Code requires employers and employees each to pay social security and Medicare taxes (FICA taxes) on the wages of employees. The social security portion of these payroll taxes are referred to by the acronym OASDI (26 U.S.C. § 3111(a) refers to this as Old Age, Survivors and Disability Insurance); the Medicare portion of these payroll taxes is called “hospital insurance” in the relevant portions of the Internal Revenue Code (see, for example, here, here, and here). Long ago, local government employers were given the option of opting out of social security for their employees; few, if any do, anymore.

The Internal Revenue Code requires employers to withhold from the paycheck of each employee earning below $137,700 a tax in an amount equal to 6.2% of wages as a social security tax and 1.45% of wages as a Medicare tax. Employers are also required to pay FICA taxes in an amount identical to that which they withhold from the wages of their employees.

Special Rule About Social Security (OASDI) Taxes Applicable to All Employers, Including Government Employers

The employment tax provisions of the FFCRA are found in Division G of the legislation. Section 7005(a) provides that any wages paid as emergency FMLA leave or emergency paid sick leave will not be considered wages for purposes of the employer social security (OASDI) tax portion of the FICA tax. In other words, the employer social security matching contribution (6.2%) will not be made when paying an employee for emergency FMLA leave (after the first 10 days) or emergency paid sick leave. Employers must make their matching Medicare contribution (1.45%).

The social security tax exemption does not apply to the employee share of FICA. Employers must withhold the full amount of the FICA tax (both the social security and the Medicare portions) from emergency FMLA leave and emergency sick leave payments. For a more detailed discussion of the Families First Act’s employer social security tax exemption, see my blog post here.

Tax Credits Not Applicable to Government Employers

Sections 7001 and 7003 of the FFCRA grant a social security tax credit to private employers for emergency paid sick leave and paid emergency FMLA leave respectively. Subsection (e)(4) of both sections expressly provide that “this credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.” This is regrettable since the tax credit is applied in both cases against the social security tax paid by employers for all other wages paid to all employees during that tax quarter. Government employers, like private employers, will be paying significant amounts in social security taxes on all wages in each quarter of 2020 in which their employees avail themselves of paid emergency FMLA leave and emergency paid sick leave.

FEMA REIMBURSEMENT FOR EMPLOYER EXPENSES ASSOCIATED WITH EMPLOYEE PAID LEAVE

In a press release detailing those protective measures associated with the COVID-19 pandemic, the Federal Emergency Management Agency has said that state and local government force account overtime costs will be eligible for reimbursement.

UPDATES

This blog post will updated to reflect any U.S. Department of Labor guidance that clarify employer requirements under the Families First Act.

Links

- www.congress.gov/bill/116th-congress/house-bill/6201/text
- www.law.cornell.edu/cfr/text/29/825.207
- www.ecfr.gov/cgi-bin/text-idx?SID=95228a5a918abcba2b57e3401d6ac893&mc=true&node=pt29.3.826&rgn=div5#se29.3.826_1160
- www.law.cornell.edu/uscode/text/29/2611
- www.law.cornell.edu/uscode/text/29/203#x
- www.law.cornell.edu/uscode/text/26/3111
- www.law.cornell.edu/uscode/text/26/3121
- www.law.cornell.edu/uscode/text/26/3101
- www.fema.gov/news-release/2020/03/19/coronavirus-covid-19-pandemic-eligible-emergency-protective-measures