

March 18, 2020

Congress Passes COVID-19 Relief Package

On March 18, 2020, the Senate approved the Families First Coronavirus Response Act (“FFCRA” or the “Act”), an emergency relief bill that aims to provide financial support for individuals who have been affected by the ongoing global 2019 Novel Coronavirus (“COVID-19”) pandemic.¹ The House initially passed the FFCRA in the early hours of the morning on Saturday, March 14,² and later approved a number of changes to the bill through a technical corrections bill.³ President Trump has indicated that he “fully support[s]” the legislation and is expected to sign the bill shortly.⁴

The FFCRA contains provisions that are designed to enhance paid sick, family, and medical leave; provide for free coronavirus testing for all individuals, including the uninsured; bolster unemployment insurance benefits; and increase funding for nutrition and food assistance programs.

This Memorandum summarizes key provisions of the FFCRA, including the requirement for certain employers to provide paid leave to employees impacted by COVID-19, as well as the various benefits that will be made available for affected individuals through federal funding. For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss’s [Coronavirus Resource Center](#).

The FFCRA’s Emergency Leave Provisions

The provisions of the FFCRA that are most likely to impact employers directly are the emergency leave provisions, which require employers to provide additional emergency paid sick leave, under the Emergency Paid Sick Leave Act (“EPSLA”), to employees who must miss work due to certain enumerated reasons relating to COVID-19 and additional public health emergency leave, under the Emergency Family and Medical Leave Expansion Act (“FMLA”), for a qualifying need pertaining to COVID-19. The Act provides for a refundable tax credit to help offset the incremental cost to employers of providing these benefits, as discussed further below. The bill does not alter an employer’s obligation to comply with applicable state or local leave laws providing for more generous leave benefits to employees.

¹ Families First Coronavirus Response Act, H.R. 6201, 116th Cong. (2020). All citations are to the House bill.

² *Id.*

³ H.R. Res. 904, 116th Cong. (2020).

⁴ Donald J. Trump (@realDonaldTrump), Twitter (Mar. 13, 2020, 8:42 PM), <https://twitter.com/realDonaldTrump/status/1238626501555298308>.

Emergency Paid Sick Leave Act

The EPSLA requires certain employers to provide emergency sick leave to any employee with a qualifying need. This provision applies to private employers with fewer than 500 employees and government employers. With regard to private employers, the EPSLA defines “covered employer” as “any person engaged in commerce or in any industry or activity affecting commerce that [] in the case of a private entity or individual, employs fewer than 500 employees.”⁵ The provision applies to “any person acting directly or indirectly in the interest of an employer in relation to an employee” and “any successor in interest of an employer.”⁶ Qualifying employers will be required to provide two weeks of paid sick leave—for full time workers, 80 hours, or, for part-time workers, a number of hours equal to the number of hours that the employee works, on average, over a two week period—for reasons related to COVID-19.⁷

Specifically, employers will be required to provide leave to employees in the following circumstances:⁸

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 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 subject to a federal, state, or local quarantine or isolation order or an individual advised by a health care provider to self-quarantine due to COVID-19 related concerns.
5. The employee is caring for a child whose school or place of care has been closed, or whose childcare provider 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 Treasury or Secretary of Labor.

⁵ H.R. 6201 § 5110(2)(B).

⁶ *Id.*

⁷ *Id.* § 5102(b).

⁸ *Id.* § 5102(a).

All employees are eligible for emergency sick leave, regardless of the duration of their employment.⁹ An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave described above.¹⁰ Paid sick leave under the Act must be provided in addition to whatever paid leave is already provided under the employer's policies, and the Act does not alter an employer's obligation to comply with applicable state or local leave laws.¹¹ Paid sick leave must be provided at the regular rate of pay, unless the employee takes leave to care for an individual subject to quarantine, a minor child whose school or childcare center has been closed because of coronavirus, or an individual experiencing any other specified, substantially similar condition, in which case pay must be at two-thirds the regular rate.¹² The paid leave benefit is capped at \$5,110 for full-rate sick time and \$2,000 for two-thirds rate sick time.¹³

Additionally, small businesses with fewer than 50 employees may receive a hardship exemption from the Department of Labor if paid sick leave "would jeopardize the viability of the business as a going concern."¹⁴ The Secretary of Labor may also exclude certain health care providers and emergency responders.¹⁵ Read literally, the bill does not guarantee paid sick leave if employees are unable to work solely due to business closure.

The EPSLA is to take effect not later than 15 days after the date of enactment of the Act and remain in effect until December 31, 2020.¹⁶

Emergency Family and Medical Leave Expansion Act

The FMLEA also temporarily expands the Family and Medical Leave Act ("FMLA") and requires private employers with fewer than 500 employees and government employers to cover 12 weeks of public health emergency leave for a qualifying need related to the COVID-19 emergency.¹⁷ Under this provision, the employee must be unable to work or telework in order to care for a minor child if the child's school or place of care has been closed, or the child care provider is unavailable due to COVID-19.¹⁸ The provision overrides

⁹ *Id.* § 5102(e)(1).

¹⁰ *Id.* § 5102(e)(2)(B).

¹¹ *Id.* § 5107.

¹² *Id.* § 5110(5)(B).

¹³ *Id.* § 5110(5)(A).

¹⁴ *Id.* § 5111.

¹⁵ *Id.*

¹⁶ *Id.* §§ 5108, 5109.

¹⁷ *Id.* § 3102.

¹⁸ *Id.* § 3102(b) (amending Title I of the Family and Medical Leave Act of 1993 to add Section 110).

the definition of “employer” set forth in the existing FMLA, replacing the original “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year” with “fewer than 500 employees.”¹⁹ The FMLEA does not provide further details on its definition of an employer.

Employers must provide this leave to any employee who has worked 30 days or more for the employer.²⁰ The first ten days of such leave may be unpaid, but thereafter, paid leave must be available at two-thirds the employee’s regular rates.²¹ Employees may use emergency paid sick leave, as described above, to provide for full or partial wage payment during the first two, unpaid weeks of family and medical leave.²² This paid leave benefit is capped at \$200 per day and \$10,000 in the aggregate.²³ Employees who work under a multi-employer collective bargaining agreement are entitled to paid leave without additional or different requirements.²⁴

Additionally, small businesses with fewer than 50 employees may receive a hardship exemption from the Department of Labor if paid family and medical leave “would jeopardize the viability of the business as a going concern.”²⁵ The Secretary of Labor may also exclude certain health care providers and emergency responders.²⁶ Based on a literal reading of the bill, the family and medical leave would not be available if employees are unable to work solely due to business closure.

The FMLEA is to take effect not later than 15 days after the date of enactment of the Act and remain in effect until December 31, 2020.²⁷

Tax Credits Pertaining to FFCRA’s Emergency Leave Provisions

For amounts required to be paid under the EPSLA, the FFCRA provides employers a refundable tax credit, applied against employer-side Federal Insurance Contribution Act (“FICA”) taxes (and a similar credit under the social security system for railroad employers (the “RRTA”)).²⁸ The credit is generally capped at \$511 per employee per day for amounts required to be paid in connection with employee-based sick leave

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* § 3103(b).

²⁵ *Id.* § 3102(b) (amending Title I of the Family and Medical Leave Act of 1993 to add Section 110).

²⁶ *Id.*

²⁷ *Id.* §§ 3102, 3106.

²⁸ *Id.* § 7001(a).

and at \$200 per employee per day for family-based sick leave, increased by employer health plan expenses allocable to the employee's paid sick leave and for additional Medicare payroll taxes imposed on credit-eligible amounts.²⁹ If an employer claims the credit, the Act provides for the recapture of the deduction otherwise associated with creditable wages.³⁰ Employers may elect out of claiming the credit on a quarterly basis.³¹ The Act provides a parallel refundable tax credit, generally to be applied against 2020 income taxes, for individuals subject to self-employment tax, with adjustments for individuals with both self-employment and third-party employment income to eliminate any double benefit.³²

For amounts required to be paid under the FMLEA, the Act similarly provides employers a refundable FICA (or, as applicable, RRTA) tax credit.³³ This credit is capped at \$200 per employee per day, increased by employer health plan expenses allocable to the employee's leave and for additional Medicare payroll taxes imposed on credit-eligible amounts.³⁴ As with the EPSLA credit, if an employer claims the FMLEA credit, the Act provides for the recapture of the deduction otherwise associated with creditable wages.³⁵ Employers may elect out of claiming the credit on a quarterly basis.³⁶ The Act provides a refundable tax credit paralleling the FMLEA credit available to employers, generally to be applied against 2020 income taxes, for individuals subject to self-employment tax, with adjustments made for individuals with both self-employment and third-party employment income to eliminate any double benefit.³⁷

The Act also generally exempts wages paid under the EPSLA and FMLEA from employer-side FICA (or, as applicable, RRTA) taxes.³⁸

Additional Emergency Benefits for Individuals and Families Under the FFCRA

In addition to the supplemental leave mandated by the EPSLA and the expansion of the FMLA, the FFCRA provides other means of financial support for individuals and families affected by COVID-19, including free

²⁹ *Id.* §§ 7001(b), 7001(d), 7005(b).

³⁰ *Id.* § 7001(e)(1).

³¹ *Id.* § 7001(e)(2).

³² *Id.* § 7002.

³³ *Id.* § 7003(a).

³⁴ *Id.* §§ 7003(b), 7003(d), 7005(b).

³⁵ *Id.* § 7003(e)(1).

³⁶ *Id.* § 7003(e)(2).

³⁷ *Id.* § 7004.

³⁸ *Id.* § 7005(a).

coronavirus testing for all individuals, regardless of whether they are insured,³⁹ additional unemployment insurance benefits,⁴⁰ and increases in federal funding for nutrition and food assistance programs.⁴¹

Coverage for Coronavirus Testing

The FFCRA requires employer health plans, individual health insurance plans, and specified public healthcare plans to cover the costs of COVID-19 diagnostic testing and testing-associated healthcare provider visits.⁴² These requirements will remain in effect until the end of the national emergency period that was declared by President Trump on March 13, 2020.⁴³

The FFCRA requires employer health insurance plans and private individual health insurance plans to cover (i) the costs of FDA-approved diagnostic testing for COVID-19 and costs for administering such tests, and (ii) any items or services rendered during a visit to a healthcare provider (including a tele-health visit), urgent care provider, or emergency room that results in the order for the diagnostic test.⁴⁴ Such costs are fully reimbursable to the covered individual and are not subject to deductibles, co-payments, pre-authorization, or other existing plan requirements for cost-sharing that would otherwise apply.⁴⁵ The FFCRA expressly limits reimbursement to items or services that relate to providing or administering the test for diagnosing COVID-19 and does not require or provide coverage for any costs for treatment of COVID-19 other than as provided for under existing private healthcare plans.⁴⁶ The FFCRA requires coverage for COVID-19 testing from the date of enactment of the Act until the end of the period of national emergency declared by President Trump.⁴⁷

The Act provides for Medicare Part B coverage for any cost-sharing normally required on the part of beneficiaries for costs of visits or services from care providers (including nursing home and rest home

³⁹ *Id.* §§ 6001, 6002, 6003, 6004.

⁴⁰ *Id.* §§ 4101, 4102, 4103, 4104, 4105.

⁴¹ *Id.* §§ 2101, 2102, 2201, 2202, 2203, 2204, 2301, 2302.

⁴² *Id.* §§ 6001, 6002, 6003, 6004.

⁴³ *Id.* § 6001(a).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *Id.*

services) during which a COVID-19 diagnostic test is administered or ordered.⁴⁸ COVID-19 diagnostic test costs are covered under existing provisions of Medicare Part B.⁴⁹

The Act also makes COVID-19 diagnostic testing and visits to healthcare providers in which testing is received available at no cost to the beneficiary or with cost-sharing waived (as applicable to the relevant program) for individuals covered by the following public healthcare programs:

- individuals receiving care under Medicare Advantage;⁵⁰
- individuals receiving care under Medicaid and the Children's Health Insurance Plan;⁵¹
- American Indians and Alaskan Natives receiving care from Indian Health Services, including those referred for care away from Indian Health Services or tribal health care facilities;⁵² and
- individuals receiving care under TRICARE (providing coverage for uniformed service members, retirees, and their families), veterans receiving care through the Department of Veterans Affairs, and federal workers enrolled in a health benefits plan.⁵³

The Act allows states to extend Medicaid eligibility for uninsured populations to cover COVID-19 diagnostic testing, with the federal government matching state expenditures for medical and administrative costs.⁵⁴ The Act also increases the percentage of state expenditures on Medicaid services that will be matched by the federal government during each quarter that the public health emergency period continues.⁵⁵ To be eligible for increased federal matching, states must, among other things, maintain Medicaid eligibility standards that are no more restrictive than they were on January 1, 2020.⁵⁶

⁴⁸ *Id.* § 6002.

⁴⁹ 42 U.S.C. § 1395l(a)(1).

⁵⁰ H.R. 6201, § 6003.

⁵¹ *Id.* § 6004.

⁵² *Id.* § 6007.

⁵³ *Id.* § 6006.

⁵⁴ *Id.* § 6004(a)(3).

⁵⁵ *Id.* § 6008(a).

⁵⁶ *Id.* § 6008(b).

Funding for COVID-19 diagnostic testing is provided as follows:

- \$1 billion to the Public Health and Social Services Emergency Fund to reimburse costs and claims associated with providing COVID-19 testing and testing-related services for individuals without health insurance;⁵⁷
- \$82 million to the Department of Defense for those receiving care through the Defense Health Program;⁵⁸
- \$64 million to the Indian Health Service for Native Americans receiving healthcare from the Indian Health Service or through an Urban Indian Health Organization;⁵⁹ and
- \$60 million to the Department of Veterans Affairs.⁶⁰

The Act also provides immunity to certain entities associated with the supply chain for personal respiratory protective devices.⁶¹ Specifically, the Act provides that such devices that are authorized for emergency use and approved by the National Institute of Occupational Health and Safety are “covered countermeasures” under Section 319F-3(i) of the Public Readiness and Emergency Preparedness Act (“PREP Act”).⁶² The PREP Act, among other things, provides “covered persons” with immunity against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of covered countermeasures, subject to certain exceptions.⁶³ Pursuant to the FFCRA, such immunity would be applicable to claims arising from personal respiratory protective devices used during the period beginning January 27, 2020 and ending October 1, 2024, in response to the public health emergency declared on January 31, 2020 as a result of confirmed cases of COVID-19.⁶⁴

Emergency Unemployment Insurance Stabilization Provisions

The FFCRA provides states with additional funding and resources to assist them with the provision of unemployment insurance (“UI”) benefits.

⁵⁷ *Id.*, Div. A, Title V.

⁵⁸ *Id.*, Div. A, Title II.

⁵⁹ *Id.*, Div. A, Title IV.

⁶⁰ *Id.*, Div. A, Title VI.

⁶¹ *Id.* § 6005.

⁶² *Id.*

⁶³ 42 U.S.C. § 247d-6e.

⁶⁴ H.R. 6201, § 6005.

The FFCRA provides \$500 million in funding to the states within 60 days of enactment through the Unemployment Trust Fund for staffing, technology, systems, and other administrative costs related to paying and processing UI benefits.⁶⁵ To be eligible for this funding, states must:

- require that employers provide laid-off workers with notice of potential UI eligibility;
- offer at least two of the following ways to apply for UI benefits: online, by phone, or in-person; and
- notify UI applicants once their application has been received and will be processed. If an application cannot be processed, states must notify the applicant and provide information on how to revise the application so that it may be processed.

The FFCRA also reserves \$500 million in funding for emergency grants to be provided to states that experience at least a 10% increase in unemployment (compared to the same quarter in the previous calendar year).⁶⁶ States meeting these criteria can receive an additional grant in the same amount as the UI administrative funding grant discussed above. To receive this emergency grant, states experiencing a 10% increase in unemployment must take steps to ease eligibility requirements for UI benefits that may be limiting access due to the COVID-19 outbreak, including waiving work search requirements, required waiting periods, and requirements to increase employer UI taxes if employers have high layoff rates.⁶⁷

For states that experience at least a 10% increase in unemployment over the same quarter in the previous year, the FFCRA also provides for 100% federal funding of Extended Benefits (“EB”) until December 31, 2020.⁶⁸ EB, which usually require the state to fund 50% of the benefit, kick in when unemployment is high within a state and provide up to an additional 26 weeks of assistance after regular UI benefits expire (generally after 26 weeks). To receive full federal funding of EB, states must also comply with the provisions easing beneficiary access discussed above.

The FFCRA also provides states with access to interest-free loans to help them pay UI benefits through December 31, 2020.⁶⁹

⁶⁵ *Id.* § 4102(a).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* § 4105(a).

⁶⁹ *Id.* §4103.

The FFCRA further directs the Secretary of Labor to provide technical assistance and guidance to states in establishing, implementing, and improving short-time compensation programs.⁷⁰ Under such programs, employers would reduce hours instead of laying off employees, and employees would be eligible for partial UI benefits to help offset the wage loss resulting from their reduced hours.

Food Security

Several provisions of the FFCRA aim to provide food security for families and children by leveraging existing programs—including the Supplemental Nutrition Assistance Program (“SNAP”), the Special Supplemental Nutrition Program for Women Infants and Children (“WIC”), and the Administration for Community Living’s (“ACL”) Senior Nutrition program—and by ensuring continued access to meals provided by child and adult care centers in the event that there is a disruption to the centers’ food supply.

The Act also creates the Maintaining Essential Access to Lunch for Students program (“MEALS”), with the express purpose of providing continued access to meals to children and adults who receive meals at care centers (including schools) if they close for a period of five days or longer.⁷¹ This provision aims to ensure schools and other care centers that close for regular operations during the crisis will have funds to continue to provide meals to those who currently rely on receiving daytime meals at these places.

The FFCRA also gives the Secretary of the Department of Agriculture (“USDA”) power to approve state plans to provide emergency Electronic Benefit Transfer (EBT) food assistance to households with children who would otherwise receive free or reduced-price school meals but for COVID-19-related school closures, even if such plans increase costs to the federal government.⁷²

Individuals who currently receive food assistance through federal and state programs should expect they will continue to receive such assistance for the duration of the COVID-19 emergency, even if they receive meals through their schools or care centers that have closed or will close. Those who currently receive nutrition assistance through SNAP may receive additional emergency allotments during the crisis.⁷³ Additionally, individuals who lose their jobs during the crisis and as a result require food assistance may become eligible under the FFCRA, even if they were not previously eligible.⁷⁴

⁷⁰ *Id.* § 4104.

⁷¹ *Id.* §2102.

⁷² *Id.* §§ 1101(d), 2102(b).

⁷³ *Id.* § 2302.

⁷⁴ *Id.*

The FFCRA waives certain requirements for existing programs (*e.g.*, physical presence at a WIC center to receive an eligibility certification, and work and training requirements under SNAP), increases their funding to expand the number of individuals who can receive benefits, and increases allocations for individuals who already receive benefits, if necessary.⁷⁵ Individuals who currently receive benefits under these programs or who seek access to benefits as a result of income or employment changes due to the crisis should consult their care center or local administering agency to determine their eligibility status under these programs. Companies and organizations who reduce their number of employees during the crisis should direct the unemployed persons to determine if they become eligible for assistance under SNAP or WIC as a result of their unemployment.

Organizations that locally administer SNAP benefits should consider whether some individuals are newly eligible to receive benefits and whether individuals currently receiving benefits are now eligible to receive additional benefits during the crisis. Such organizations should also be aware that certain paperwork requirements will be waived during the crisis to increase their responsiveness and flexibility.

The FFCRA aims to ensure availability of adequate funding for the domestic nutrition assistance programs through express federal budgetary allocations for specific programs and by empowering the USDA to approve state plans for food security in the event of extended care center closures. The FFCRA provides emergency funding as follows:

- \$500 million for WIC, specifically to provide access to nutritious foods to low-income pregnant women or mothers with young children who lose their jobs or are laid off due to the COVID-19 emergency;
- \$400 million towards assisting local food banks, which are anticipated to meet increased demand to support low-income Americans during the emergency, with \$300 million dedicated to purchasing nutritious foods and \$100 million to support storage and distribution of the food;
- \$250 million for Department of Health and Human Services programs that aid elderly Americans, including the ACL's Senior Nutrition program, which provides grants to states, territories, and eligible tribal organizations to provide approximately 25 million additional home-delivered and pre-packaged meals to low-income seniors who are home-bound, have disabilities, and have multiple chronic illnesses, as well as to their caregivers; and

⁷⁵ *Id.* § 2301.

- \$100 million to the USDA to provide nutrition assistance grants to Puerto Rico, American Samoa, and the Commonwealth of the Northern Mariana Islands in response to the COVID-19 public health emergency.⁷⁶

Implementation of the FFCRA

In the coming days, we expect regulatory agencies at the federal, state, and local level to announce policies and procedures implementing the various provisions of the FFCRA. We will continue to monitor developments and keep clients apprised of pertinent information.

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⁷⁶ *Id.*, Div. A, Title I.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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