


Employment Law Update On Families First Coronavirus Response Act (FFCRA) And New Coronavirus Aid, Relief And Economic Security (CARES) Act




COVID-19

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Emergency Paid Sick Leave Act



Applies to all employers with under 500 employees.

- Full-time and part-time employees.
- Anywhere in the United States (including DC, U.S. territories or possessions).
- Employees on leave.
- Temporary employees.
- Day laborers.

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Emergency Paid Sick Leave Act



The normal FMLA "integrated employer test" applies to determine if related employers are counted as a single employer.

- Interrelation of operations.
- Common management.
- Centralized control of labor relations.
- Common ownership and financial control.

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Emergency Paid Sick Leave Act

Secretary of Labor may issue regulations exempting employers with less than 50 employees, if it is determined that the obligation would "jeopardize the viability of the business as an going concern."

A small business may claim this exemption if "an authorized officer" of the business makes one of three determinations:



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Emergency Paid Sick Leave Act

- Pay for sick leave or expanded FMLA would result in expenses and financial obligations that exceed available business revenues and cause the small business to cease operating at a minimal capacity, or
- Absence of the employee(s) requesting leave entails 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 are not sufficient workers able, willing, qualified, and available at the time and place needed, to do the work of the employee(s) requesting leave, and that work is necessary to operate at a minimal capacity.



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Emergency Paid Sick Leave Act

Requires employers to provide paid sick time to all employees (including new hires and part-time employees) who are unable to work or telework for specified reasons related to COVID-19.



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Emergency Paid Sick Leave Act

An employee is entitled to emergency paid sick leave if they are:

- Subject to a federal, state or local quarantine or isolation order related to COVID-19.
- Advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis.

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Emergency Paid Sick Leave Act

- Caring for an individual who is subject to a quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Caring for a son or daughter of the employee if the school or place of care of the son/daughter has been closed, or their child care provider is unavailable due to COVID-19 precautions.
- Experiencing any other "substantially similar condition" as specified by the Secretary of Health and Human Services (in consultation with the Secretary of the Treasury and the Secretary of Labor).

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Emergency Paid Sick Leave Act

Is Governor Whitmer's stay at home order a quarantine or isolation order that triggers paid sick leave?

- Guidance from the Department of Labor indicates that it is not.
- If an employer is closed "you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive."

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Emergency Paid Sick Leave Act

- Full-time employees (those normally scheduled for 40 hours or more per week) are eligible for 80 hours of paid leave.
- Part-time employees (those normally scheduled for less than 40 hours per week) are entitled to leave in an amount equal to the average number of hours they work over a two week period.
- Calculating pay.

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Emergency Paid Sick Leave Act

- Employees are entitled to receive full pay, capped at \$511 per day/\$5,111 total, for time missed due to government order or their own health reasons.
- Employees are entitled to receive 2/3 pay, capped at \$200 per day/\$2,000 total, for time missed due to care for a child or another individual.

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Emergency Paid Sick Leave Act

This paid sick leave:

- Does not need to be paid out at termination.
- Does not need to be carried over into next year.

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Emergency Family and Medical Leave Expansion Act

Applies to companies with fewer than 500 employees:

- The normal FMLA "integrated employer test" applies to determine if related employers are counted as a single employer.
- As with sick leave, employers with less than 50 employees can be exempt, if it is determined that the obligation would "jeopardize the viability of the business as a going concern".

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Emergency Family and Medical Leave Expansion Act

Applies to employees who have been employed for 30 or more calendar days (full or part time) and have a "qualifying need."

CARES Act Update:

Also applies to employees (1) laid off not earlier than March 1, (2) worked for the employer 30 of last 60 days before layoff, and (3) are subsequently rehired.

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Emergency Family and Medical Leave Expansion Act

"Qualifying Need"

- Unable to work (or telework) due to a need to care for the employee's minor child if, due to COVID-19:
 - The child's elementary or secondary school has been closed.
 - The child's place of care has been closed.
 - The child's care provider is unavailable.

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Emergency Family and Medical Leave Expansion Act

- Employees can take the first 10 days of leave as unpaid leave.
- Employees may elect to use any accrued vacation, personal, medical or sick leave instead of taking unpaid leave.

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Emergency Family and Medical Leave Expansion Act

After the first 10 days, the employer must provide at least partial paid leave for each additional day of qualifying leave.

- Must be at least 2/3 of the employee's regular rate of pay, multiplied by the number of hours the employee would otherwise have been scheduled to work.
- Credit is capped at \$200 per day/\$10,000 total.

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Emergency Family and Medical Leave Expansion Act

- Employees taking leave are entitled to job restoration, like any other FMLA leave.
- Small employers (less than 25 employees) may be able to deny job restoration if, at the end of the leave:
 - The position the employee held no longer exists due to conditions caused by COVID-19;
 - The employer makes reasonable efforts to restore them to an equivalent position; and
 - If those efforts fail, the employer makes reasonable efforts to contact the employee to offer an equivalent position that becomes available within 12 months.

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Emergency Family and Medical Leave Expansion Act

Can this emergency FMLA leave be taken intermittently?

- Teleworkers: Allowed, if employer agrees
- In-person workers: Not allowed, *except for* care for a child whose school or place of care is closed, or childcare provider is unavailable (and, again, if employer agrees).

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FFCRA Documentation

- Paid Sick Leave: "as specified in applicable IRS forms, instructions, and information."
- Expanded FMLA: employers may also require proof of closure of school, place of care, or unavailability of care provider
 - Posted on website
 - Published in a newspaper
 - Provided via email

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CARES Act

\$2.1 trillion stimulus package with benefits for individuals and businesses in various ways

- Direct relief to individuals
- Loans to businesses on favorable terms

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CARES Act

Unemployment Insurance

- The CARES Act expands coverage to make additional workers eligible
- Workers must self-certify they are in one of the following categories to be a "covered individual"
 - The individual has been diagnosed with COVID-19 or has symptoms and is seeking treatment
 - A member of the individual's household has been diagnosed with COVID-19
 - The individual is caring for a household member diagnosed with COVID-19
 - A child is unable to attend school or daycare as a result of the pandemic

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CARES Act

Unemployment Insurance

- "covered individual" (cont.)
 - The individual was scheduled to commence employment and could not due to COVID-19
 - The individual's place of employment is closed, or the individual had to quit his or her job due to COVID-19 or
 - The individual is self-employed, part-time employed, or is otherwise not typically qualified to receive unemployment benefits and meets at least one of the criteria listed above

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Unemployment Insurance

- Individuals expressly excluded
 - An individual who has the ability to telework with pay
 - An individual receiving paid sick leave or other paid leave benefits regardless of whether covered by the above

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CARES Act

Unemployment Insurance

- Expanded benefits and time periods
 - Extends duration of unemployment insurance to 39 weeks (from 26 currently in Michigan) during the time period January 27, 2020 – December 31, 2020
 - \$600/week increase in amount available under state law for the first four months – through July 31, 2020
 - States can also enter into agreements with the federal government to provide unemployment compensation to individuals who have exhausted all of the benefits available to them or are not otherwise eligible under existing state and federal law – other rules also apply

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Unemployment Insurance

- Temporary funding for short-time compensation plans
 - Short time programs enable employees with reduced hours to receive pro-rated unemployment benefits
 - The federal government will cover the full cost of the program until the end of the year
 - Michigan has such a program – the "Work Share" program

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CARES Act

Paycheck Protection Program – General Overview

- Greatly expands SBA loan eligibility
- Covers the period of February 15, 2020 to June 30, 2020
- SBA may provide 100% federally-backed loans to eligible businesses
- \$349 billion will be provided for the Paycheck Protection Program and Loan Forgiveness

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Paycheck Protection Program – General Overview

- Eligibility
 - Companies that employ no more than 500 employees with certain exceptions based on particular industry
 - Waives credit available elsewhere, personal guaranty and collateral requirements
 - Must be operational on February 15, 2020 and have employees for whom paid salaries and payroll taxes or a paid independent contractor
 - All or a portion of the loan may be forgivable and lenders will be able to defer payments on the principal and interest of the loan for a minimum of 6 months and up to 1 year

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Paycheck Protection Program – General Overview

- Maximum Loan Amount
 - 2.5 times average total monthly payroll costs OR
 - \$10 million
- Permitted Uses of Loan Proceeds
 - Payroll costs, continuation of healthcare benefits, employee compensation (those making less than \$100K), mortgage interest, rent, utilities, interest on debt incurred before the covered period

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Loan Forgiveness – General Overview

- Loans are forgivable in an amount up to the amount paid by the business for payroll (including wages to tipped employees), rent, utilities, and mortgages during the 8 weeks after origination of the loan
- The amount forgiven will be reduced proportionally by a formula related to layoffs or salary or wage reductions during the 8-week period after origination of the loan
- A borrower is able to avoid this reduction by rehiring employees and eliminating the reduction in salary by June 30

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CARES Act

Other Provisions of Note

- Disaster Loan Program (Title I, section 1110)
- Title II Subtitle C – Business Provisions
 - Tax credits and other programs of potential assistance
- Title IV – Economic Stabilization to Distressed Sectors of Economy
 - Many types of loans, loan guarantees and other investments to various businesses/business sectors
 - Many come with conditions – for example low-interest loan to eligible business with 500-10,000 employees must agree to remain neutral regarding current or future union organizing activity

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Q&A

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