

## **WHAT THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT MEANS FOR YOUR BUSINESS**

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In response to the COVID-19 pandemic, President Trump signed the [Families First Coronavirus Response Act](#) (the “Act”) into law on March 18, 2020, and it takes effect no later than April 2, 2020—15 days from enactment. The law significantly increases paid leave requirements on employers with fewer than 500 employees and then offsets that burden with payroll tax credits.

### Emergency Paid Leave for Those Affected by Coronavirus

Under the Act, employers with fewer than 500 employees must provide employees who cannot work or telework with paid sick leave if the employee meets any of the following criteria:

- (i) an employee subject to a coronavirus quarantine or isolation order;
- (ii) an employee who has been advised by a health care provider to self-quarantine due to coronavirus concerns;
- (iii) an employee who is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
- (iv) an employee caring for an individual who is subject to a coronavirus quarantine or isolation order or who has been advised by a health care provider to self-quarantine due to coronavirus concerns;
- (v) an employee caring for a child whose school or daycare is closed, or the childcare provider of the child is unavailable, due to coronavirus precautions; or
- (vi) an employee is experiencing any other substantially similar condition specified by Health and Human Services in consultation with the Department of the Treasury and the Department of Labor.

Employees do not have to be employed for a certain length of time to be eligible for emergency paid leave. Employers who are health care providers or emergency responders may elect to exclude their employees from the public health emergency leave provisions of the Act. Additionally, the Act grants the Secretary of Labor authority to exempt small businesses with fewer than 50 employees from the Act’s paid leave requirements if those requirements would jeopardize the viability of the business.

The Act mandates paid leave of up to 80 hours for full-time covered employees. Emergency paid leave is in addition to any other paid sick leave provided by a covered employer (less than 500 employees). The Act calls for pay at an employee's regular rate if the employee takes leave to treat the employee's own health issues related to COVID-19 or the employee is subject to a quarantine or isolation order. For all other qualifying reasons, the Act requires paid leave at two-thirds of an employee's regular rate. Part-time employees are entitled to paid leave equivalent to their average hours worked in a two-week period.

Paid leave for an employee is capped at \$511 per day and \$5,110 in the aggregate for leave by an employee subject to a coronavirus quarantine or isolation order or who has been advised by a health care provider to self-quarantine due to coronavirus concerns. Paid leave for an employee is capped at \$200 per day and \$2,000 in the aggregate for leave taken in categories to care for another.

Public Health Emergency Leave (FMLA Expansion) If Caring for Children Affected by School Closure

The Act expands the Family Medical Leave Act ("FMLA") to provide "public health emergency leave." Eligible employees are those who are unable to work or work from home due to a need to care for the employee's child if the child's school or place of care has been closed because of a declared emergency by a federal, state, or local government authority. Public Health Emergency Leave applies to any employees (both full-time and part-time) who have been employed for at least 30 days. Employees have up to 12 weeks of Public Health Emergency Leave, which goes into effect after 10 days of unpaid leave—so essentially 10 weeks of paid leave. During the first 10 days of unpaid leave, the employee can use accrued vacation leave, personal leave, sick leave or any other form of paid time off. The employee can also use the two weeks of Emergency Paid Leave set forth above.

The Act requires employers to provide 10 weeks of paid leave at a rate of two-thirds of the employee's regular rate of pay for the hours the employee would normally be scheduled to work. The amount of paid leave per employee cannot exceed \$200 per day and \$10,000 in the aggregate during the FMLA public health emergency leave.

Employers with fewer than 50 employees may obtain an exemption if the Department of Labor determines that providing the paid leave would jeopardize the viability of the business. Additionally, employers with fewer than 50 employees are exempt from any private right of action for noncompliance with the leave requirements. Employers with fewer than 25 employees who provide FMLA leave are exempt from the FMLA's job restoration requirements if the (1) the employee's job position does not exist due to economic conditions caused by the coronavirus; (2) the employer makes reasonable



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efforts to restore the employee to an equivalent position; and (3) an equivalent position does not become available in the following year.

Tax Credits for Employers Paying Leave

Finally, the Act creates a system of “refundable tax credits” for employers who make Emergency Paid Leave payments or Public Health Emergency Leave payments. The Act provides for a dollar-for-dollar refundable tax credit on any covered payments made by an employer. The amount of the credit may be increased by an employer’s health plan expenses that are allocable to leave wages (i.e., employer-paid premiums to continue group medical coverage for eligible employees). The credit is capped at \$511 per day per employee and \$7,156 aggregate per employee for Emergency Paid Leave, and \$200 per day per employee and \$10,000 aggregate per employee for Public Health Emergency Leave.

Normal withholding rules apply to leave payments for income tax purposes and employee Federal Insurance Contributions Act (FICA) tax purposes. Leave payments are not subject to employer Social Security tax but are subject to employer Medicare tax (although such liability will be offset by the tax credit that an employer will receive). The tax credit is applied against the employer’s share of FICA taxes. If the amount of the credit exceeds an employer’s FICA tax liability, then the excess will be refunded to an employer. Employers must include the amount of credits received in their gross income. The Department of the Treasury will be authorized to issue regulations or guidance relating to the credits.

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For more information about navigating issues your business may be facing due to COVID-19, please do not hesitate to contact Trey Cooper ([tcooper@ddh.law](mailto:tcooper@ddh.law)) or Matt Boch ([mboch@ddh.law](mailto:mboch@ddh.law)) at Dover Dixon Horne PLLC.