

**MEMORANDUM**

**TO:** Boardman & Clark Municipal Clients

**FROM:** Steven C. Zach

**DATE:** March 25, 2020

**RE:** FAMILY FIRST CORONAVIRUS RESPONSE ACT (FFCRA)  
These provisions take effect on April 1, 2020  
and expire on December 31, 2020

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**FMLA Provisions**

- Applies to private sector employers with 500 or fewer employees and public sector employers with at least one employee.
- Regulations will be enacted to exempt small businesses with fewer than 50 employees if they can show FFCRA will “jeopardize the viability of the business as a going concern.” Guidance on this hardship exemption is expected to be released soon by the Department of Labor.
- Applies to an employee who has been employed for at least 30 calendar days.
- The leave is available if the 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 the COVID-19 emergency.
- The first 10 days for which an employee takes leave may consist of unpaid leave. An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave, including the paid emergency leave set forth below.
- After the first 10 days, an employer shall provide for the remaining 10 weeks paid leave in an amount that is not less than two-thirds of an employee’s regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. This paid leave shall not exceed \$200 per day and \$10,000 in the aggregate for each employee.

- For employees whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken leave, the employer shall use the following in place of such number:
  - a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.
  - If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.
- This leave counts toward an employee's total of 12 weeks of FMLA leave. If an employee has already used some FMLA leave for other reasons, the amount of FFCRA FMLA is reduced by the amount of FMLA the employee has already taken.
- In any case where the necessity for leave is foreseeable, an employee shall provide the employer with such notice of leave as is practicable.
- **Employers with fewer than 25 employees are exempt from job restoration requirements. All other employees must make reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, unless the position held by the employee does not exist upon the employee's return due to economic conditions caused by the public health emergency.**
- **If an employee is not restored to his/her former position, an employer must make reasonable efforts to contact the employee if an equivalent position becomes available within one year beginning on the earlier of (1) the date on which the employee's need for leave concluded, or 12 weeks after the date on which the employee's leave commenced. Additional guidance is needed as to whether such an employee is automatically entitled to this position or if the employee merely has the right to apply for such a position.**

#### **Paid Emergency Leave**

- An employer shall provide to each employee paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
  - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  - The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed or is unavailable due to COVID-19.
  - The employee is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services.
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- Public sector employers may elect to exclude an emergency responder from FFCRA paid emergency leave. Guidance will be forthcoming on the scope of this exemption.
  - Paid sick time provided to an employee ends beginning with the employee's next scheduled work shift immediately following the termination of the need for paid sick time.
  - An employer may not require, as a condition of providing paid sick time, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time.
  - The paid sick time shall be available for immediate use by the employee regardless of how long the employee has been employed by an employer.
  - The employee may not carry the sick leave over to the next calendar year.
  - Employers do not need to pay out any unused leave upon separation from employment.
  - An employee may first use the paid sick time under FFCRA. An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under FFCRA.
  - An employer is not prohibited from modifying its current sick leave policies to conform to the FFCRA so employees are not entitled to both.

- Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor within the next 7 days.
- The amount of pay is as follows:
  - Up to 80 hours based on the number of hours the employee would otherwise be normally scheduled to work or for part-time employees the number of hours equal to the number of hours that such employee works on average over a two-week period. The calculation for employees whose schedule varies is the same as the FFCRA FMLA provisions.
  - The amount of pay shall not to exceed \$511 per day and \$5,110 in the aggregate if:
    - The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
    - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
    - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - The amount of pay shall not exceed \$200 per day and \$2,000 in the aggregate for an employee who is:
    - caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provide to self-quarantine due to concerns related to COVID-19.
    - Caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed or is unavailable due to COVID-19.
    - The employee is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services.
  - The amount paid is based upon the employee's FLSA regular rate of pay up to the amount of the cap.

**Tax Issues**

- Any wages paid to employees due to either type of FFCRA leave are not subject to either FICRA or Medicare taxes.
- To help private employers pay for the cost of the new FFCRA paid leave benefits, private employers will be able to take a refundable tax credit equal to the amount of benefits paid to qualifying employees. The credit is applied against the employer's share of FICA and Medicare tax liability for the quarter in which the sick leave pay is paid. If the total sick leave payments made by the employer exceed its share of such taxes, the difference is refundable to the employer. Public employers are not eligible for these tax credits.

**General Provisions:**

- This law does not diminish the rights employees have under other laws.
- An employer may not retaliate against an employee for exercising rights under this law.

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