

September 22, 2020

Staffing Construction Sites in the COVID Era

Presented by:

Jason Mettley

Elaina Smiley



MEYER
UNKOVIC
SCOTT
ATTORNEYS AT LAW

Overview

- 1) **Families First Coronavirus Response Act (FFCRA)**
 - a) **Emergency Family and Medical Leave Expansion Act (EFMLEA)**
 - b) **Emergency Paid Sick Leave Act**
- 2) **Hypothetical and Discussion**



Families First Coronavirus Response Act

- FFCRA helps the United States combat the workplace effects of COVID-19 by reimbursing American private employers with tax credits for the cost of providing employees with paid leave taken for specified reasons related to COVID-19.
- **Scheduled to end on Dec. 31, 2020**
- Must still follow FMLA applicable to employers with 50 or more employees
- FFCRA only applicable to employers with **fewer** than 500 employees
- Poster requirements



Leave Requirement for “Qualifying Event”

An eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period for one or more of the following:

- Because of the birth of a son or daughter of the employee and in order to care for such son or daughter
- Because of the placement of a son or daughter with the employee for adoption or foster care.
- In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.



Leave Requirement for “Qualifying Event” *(cont.)*

- Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.
- Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.



Leave Requirement for “Qualifying Event” *(cont.)*

EFMLEA amends the qualifying event definition by adding (f):

- An Employee is unable to work (or telework) due to the need to care for the employee’s son or daughter who is under 18 years of age and the son or daughter’s school or daycare is closed or the childcare provider is unavailable due to COVID-19
- This provision applies to **all** employers regardless of size. Other FMLA provisions only apply to employers with 50 or more employees.



Reminders

- Can be grandparent that cannot watch child, not just daycare or schools.
- Paid leave issues -
 - Only paid leave is under (f) above, not required for other FMLA.
- Don't forget other FMLA issues such as employee medical issue (COVID) and out of work.
- Intermittent leave must be approved by employer.



Families First Coronavirus Response Act

1. Qualifying Need Related To A Public Health Emergency:

- An employee is unable to work (or telework) due to a need for leave to care for the son or daughter if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency. Eligible for up to 12 weeks leave.
- Paid Time: For the initial two weeks or 10 working days, the employee can elect to take it as unpaid time, use available paid vacation/sick time or be paid pursuant to the Coronavirus Emergency Paid Sick Leave.
- The next 10 weeks, employee will be paid two-thirds of employee's regular rate of pay not to exceed \$200 per day or \$10,000 in the aggregate.



Families First Coronavirus Response Act

(cont.)

2. Emergency Paid Sick Leave Act

Employees eligible for up to 80 hours of paid sick leave, for the following reasons:

- 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.



Families First Coronavirus Response Act

(cont.)

- 4) The employee is caring for an individual who is subject to an order as described in subparagraph 1) or has been advised as described in paragraph 2).
- 5) 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 the child care provider of such son or daughter 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 the Treasury and the Secretary of Labor.



Families First Coronavirus Response Act

(cont.)

- If leave is taken for the reasons 1) through 3) mentioned, the employee receives their regular rate of pay, with the maximum amount of pay during the leave not to exceed \$511 per day (\$5,110 in the aggregate).
- If leave is taken for the reason 4) through 6) mentioned, the employee will be paid at two-thirds of employee's regular rate of pay, with the maximum amount of pay during the leave will not exceed \$200 per day (\$2000 in the aggregate).



FFCRA: Small Business Exemption

- Small business exclusion fewer than 50 employees to exempt themselves from participation
- If authorized officer of business determines one of the following:
 - The leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;



FFCRA: Small Business Exemption

- The absence of the Employee or Employees requesting would entail 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 who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the Employee or Employees requesting leave and these labor or services are needed for the small business to operate at a minimal capacity.



FFCRA: Small Business Exemption

- Must document reasons but it is not submitted to the Dep't of Labor. May be needed in event employee files a claim or DOL investigates.
- When company closes, obligations cease under FFCRA on date of closure.



Record-Keeping

- Employer keep paperwork for tax credit:
 - Notice of closure of child care provider
 - Medical documentation of COVID test or health care provider of need for leave



Hospital Project

- Owner has a general contractor with 3 subs - carpentry, electrical, and HVAC
- A carpenter tests positive for COVID-19, and the owner shuts down the project for 3 weeks
 - Is FFCRA paid leave owed?
 - Is UC insurance a consideration?
 - Does the owner need to prep the jobsite or take other measures before bringing back the construction workers?



Hospital Project (cont.)

- The project later resumes. Wendy Wirecutter tests positive for COVID-19, 4 other electricians were in “direct contact” with her, and all 5 get sent home by the electrical subcontractor
 - Who is entitled to paid leave?
 - How long / what should the electrical subcontractor require before allowing any of these workers to return to work?
 - Fred Fixit(not in direct contact with Wendy) does not feel comfortable returning to work now that Wendy tested positive, does he get paid leave?



Hospital Project (cont.)

- It is learned that Wendy tested positive for COVID-19 after returning from an out of state vacation where she attended a motorcycle rally.
- Subsequently, the owner states that any workers returning from vacation (including any new workers), are not permitted on site unless they have self-quarantined for 14 days first.



Hospital Project (cont.)

- Tom Tinknocker was on vacation at the beach with his family while this happened. He gets home on Sunday and calls his foreman, who tells him he has to quarantine for 14 days before he can come back to work at the Hospital. Tom feels fine.
 - Can the owner make this policy?
 - Does Tom get paid leave? Can he get UC?





Elaina Smiley
412.456.2821
es@muslaw.com



Jason Mettley
412.456.2843
jm@muslaw.com

Meyer, Unkovic & Scott

Henry W. Oliver Building
535 Smithfield Street, Suite 1300
Pittsburgh, PA 15222

www.muslaw.com



**MEYER
UNKOVIC
SCOTT**
ATTORNEYS AT LAW