



**Employment Law Issues Relating to the COVID-19 Crisis:
Families First Coronavirus Response Act of 2020 (FFCRA)
And U.S. Department of Labor's Regulations**

**Webinar Sponsored by Greater Miami Chamber of
Commerce HR & Workforce Development Committee**

April 7, 2020

Presented by:

Michael J. Mueller
Hunton Andrews Kurth LLP
1111 Brickell Avenue, Ste. 2500
Miami, FL 33131
Tel. 305.810.2524
Email: mmueller@huntonak.com
Website: www.HuntonAK.com

Families First Act Update: DOL Regs Issued April 1, and New FAQ's

Quick Recap of Available Benefits For Employers ≤ 499 Employees

Emergency Paid Sick Leave for 6 qualifying COVID-19 reasons

- Up to 80 hours (full-time ees) or two week equivalent (part-time ees)
- Full pay at regular rate if leave involves self-quarantine or diagnosis
- 2/3 pay if leave involves child out of school/daycare *or* care for others, *or* other future “substantially similar” conditions specified by HHS
- Maximum of \$511 daily/\$5,110 total (or \$200 daily/\$2000 total for familycare)

Emergency Family and Medical Leave Act Expansion

- Limited to employees employed 30+ days and cannot work/telework
- Up to 12 weeks/year (first 2 weeks unpaid, up to 10 more weeks paid)
- **Only permissible reason:** child out of school or childcare due to virus. THIS IS A NEW REASON FOR LEAVE, NOT MORE WEEKS
- Paid at 2/3 employee's regular rate, job-protected
- Maximum of \$200 daily/\$12,000 total

Small Business Exemption (≤ 49 Employees)

- Employee's leave is to care for his/her child whose school or place of care is closed (or child care provider is unavailable), but only if requirements of FFCRA jeopardize business viability
- No application process - exemption applies if employer decides:
 - Leave would result in financial obligations greater than available revenues and cause company to cease operating at a minimal capacity; OR
 - Employee's absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employee's specialized skills, knowledge of the business, or responsibilities; OR
 - Insufficient employees able, willing, and qualified at time and place needed to perform labor or services provided by the employee, and these labor or services are needed for business to operate at a minimal capacity.

Health Care Employees

- Employers *may* exclude employees who are either health care employees or emergency responders
- Health care providers are:
 - Anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health provider, any facility that performs laboratory or medical testing, pharmacy, OR any similar institution, employer, or entity.
- Emergency responders are:
 - Anyone necessary for transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. (Long list of examples at DOL website)

- EPSL is *in addition* to normal PTO, paid sick, & vacation benefits. For the two weeks (up to 80 hours), employee has *sole discretion* to use EPSL or any accrued paid leave provided by employer or local laws; employer cannot dictate use of accrued, employer-paid leave.
- EFMLA is different
 - For first 2 weeks, employee can elect, or employer can require, using accrued leave through employer's plan. Employee can use EPSL and/or employer's plan, or both, to "top off" to 100% of their pay.
 - For remaining 10 weeks of EFMLA, if employee is eligible due to school closures/childcare unavailability, employer *cannot require* employee to "top off" EPSL or EFMLA with his/her own accrued paid leave unless employee specifically agrees. This may require further DOL guidance.

- Poster must be conspicuously posted, may be distributed online, posted on employer website, directly mailed or e-mailed to employees
 - Does not have to be visible to job applicants
- DOL Spanish, English and Korean FFCRA posters available online at www.dol.gov/agencies/whd
 - Translation not required, but ...
 - Multiple languages will soon be available
 - Employer can use its own poster design if substantially compliant
- Documentation requirements come from IRS:
https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate_eligibility

Temporary Non-Enforcement Period by DOL HUNTON ANDREWS KURTH

- **DOL** will not bring enforcement actions against employer for violations through April 17, 2020 ...
 - Provided the employer acted “reasonably” and “in good faith”
 - Employer remedies any violations
 - Violations were not “willful”
 - “Retaliation” by employer would almost certainly be considered “willful.” Employers may *not* retaliate (discharge, demote, or otherwise discriminate) against employees who lawfully take leave, complain, or pursue legal action for a violation.
 - DOL receive a written communication from the employer to comply with the FFCRA in the future
- Having said that, **private employees** can bring individual or group actions (FLSA and/or FMLA) for wages, penalties, attorneys’ fees.

Hunton Andrews Kurth LLP Labor and Employment Pandemic Resource Center

<https://www.huntonak.com/en/coronavirus-resource-center/labor-and-employment-business-immigration.html>

DOL Fact Sheets

[Families First Coronavirus Response Act: Employee Paid Leave Rights \(PDF\)](#)

- [Spanish \(PDF\)](#)

[Families First Coronavirus Response Act: Employer Paid Leave Requirements \(PDF\)](#)

- [Spanish \(PDF\)](#)

DOL Questions and Answers

[Families First Coronavirus Response Act: Questions and Answers](#)

DOL Poster

[Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act \(FFCRA\)](#)

- [Spanish](#)

[Families First Coronavirus Response Act Notice – Frequently Asked Questions](#)