

**Labor & Employment Issues for Work Reopening:  
Update on Families First Coronavirus Response Act (FFCRA)  
And Other Wage-Hour Issues re COVID-19**

**Webinar Sponsored by Greater Miami Chamber of Commerce HR &  
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**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](mailto:mmueller@huntonak.com)  
Website: [www.HuntonAK.com](http://www.HuntonAK.com)

# Summary of Families First Act

## 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 ( $\leq 49$ 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.

# New DOL FAQ's (now up to 93)

- These are your best resource for your HR department, instead of trying to read the regulations
  - FAQ's 80-81 on leave pay for ees with irregular hours
  - FAQ's 82-83 and 85 on how to calculate the average regular rate during paid leave
  - FAQ 86 makes clear Emergency Paid Sick Leave is *in addition to* employer's or CBA's paid or unpaid leave
  - FAQ 87 makes clear that stay-at-home orders and shelter-in-place orders are the *same* as quarantine or isolation orders
  - FAQ 90 on temp staffing agencies
  - FAQ 91 on employees who seek leave while tele-working
  - FAQ 92 on what medical documentation employers may seek

# Job Restoration And Non-Discrimination Requirements Under FLSA

- Even though EPSL provisions are an amendment to FLSA (which has no job-restoration), USDOL has promulgated a regulation requiring restoration to “same or an equivalent position.”
  - Must be virtually identical to former position insofar as pay, benefits, working conditions, and same or substantially similar duties
  - This includes same worksite, schedule, bonus and profit opportunities
  - This is true even if he/she has been replaced, or position restructured. But *exception* if employer implemented actions, such as layoffs, that would have affected the employee even if no EPSL leave taken.

# Job Restoration And Non-Discrimination Requirements Under EFMLA

- The eFMLA provisions are extension of FMLA, so same job-restoration provisions (same or equivalent position)
- Exception for “key employees”
  - Employer may deny job restoration to salaried-exempt, FMLA-eligible employee among the highest paid 10% of all ees.
  - There is a test for highest 10% (YTD earnings ÷ weeks worked)
  - This determination must be made *at the time the employee gives notice of leave*, so they can make informed decision.
- There is a small-business exception
- Same exception as FLSA if job would no longer exist
- Exception for EMFLA leave that was fraudulent

- DOL has not been overly aggressive
- Most DOL enforcement has been focused on updating the FFCRA FAQ's on its web site
- Subsequent efforts have mainly been educational
  - Blog post by Wage-Hour Administrator on May 11:  
[https://blog.dol.gov/2020/05/11/are-you-eligible-for-covid-19-paid-leave?\\_ga=2.168379745.1165039002.1592496253-1132747248.1592496253](https://blog.dol.gov/2020/05/11/are-you-eligible-for-covid-19-paid-leave?_ga=2.168379745.1165039002.1592496253-1132747248.1592496253)
  - DOL gave 3 webinars to employers/employees in May
- DOL has investigated and secured back-wages for denied sick leave by 5 employers (in AZ, HI, TX, IN, and MD)

- Employees can bring private individual or group actions (FLSA and/or FMLA) for minimum or overtime wages, penalties, attorneys' fees.
- Common themes in the Florida cases filed so far:
  - Retaliation
    - For taking leave due to symptoms or stay-at-home orders
    - For objecting to unsafe working conditions/failure to follow CDC rules
    - Often coupled with claim under FL Whistleblower Protection Act
  - Unpaid overtime wages for work at home
  - Unpaid minimum wages for leave period (or wrongful termination)
  - Wrongful termination (for requesting leave)
  - Breach of contract (salary, pay period, bonus, PTO)



## **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 (expanded since the 4/7/20 webinar)**

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

### **Private Lawsuits**

<https://www.huntonak.com/en/covid-19-tracker.html>