

## **FAMILIES FIRST CORONAVIRUS RESPONSE ACT SUMMARY**

The Congress passed the Families First Coronavirus Response Act (the “Act”), which was signed into law by President Trump on March 18, 2020. The Act was further amended by the Coronavirus Aid, Relief, and Economic Stimulus Act (“CARES Act”) signed into law by President Trump on March 27, 2020. The Act became effective on April 1<sup>st</sup>, and will sunset on December 31, 2020. While the Act is comprised of economic stimulus plans and a variety of new laws, this Summary will focus upon the employment laws that most directly impact local governments. Specifically, this Summary will address the following components of the Act: (1) the Emergency Family and Medical Leave Expansion Act (the “EFMLEA” or “Emergency FMLA Leave”); and (2) the Emergency Paid Sick Leave Act (the “EPSLA”). Additionally, temporary regulations as to these two components of the Act were promulgated by the Wage and Hour Division of the U.S. Department of Labor (“DOL”) on April 1, 2020. Those temporary regulations of the DOL, codified at 29 CFR Part 826, including a subsequently published correction notice to the initial publication that makes certain technical corrections to the initial published temporary regulations, may be accessed on the DOL’s website by following this link: <https://www.dol.gov/agencies/whd/ffcra>.

### **I. EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

#### **Who is a COVERED EMPLOYER and EMPLOYEE?**

The Act significantly expands the definition of which employees are covered under the Act. Previously, an employee must have worked for the employer for the previous twelve months, worked at least 1,250 hours during that period, and worked at a location where the employer had at least 50 employees within 75 miles of the worksite. Now, however, for purposes of eligibility for Emergency FMLA Leave, an eligible employee need only work for the employer for **at least 30 days** prior to the designated emergency leave. Pursuant to a CARES Act amendment to the Act, an employee is also considered to be employed for at least 30 days and potentially eligible for Emergency FMLA if the employee was laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020, provided that the employee had been on the employer’s payroll for thirty (30) or more of the sixty (60) calendar days prior to the date of being laid-off or otherwise terminated. The Act applies to all local governments.

### **Are there any EXEMPTIONS available?**

Yes. The Act provides that an employer of an employee who is a “health care provider or an **emergency responder**” may elect to exclude such employee from the Act. While these terms are not defined in the Act, they have been defined within the DOL’s issued temporary regulations. The DOL’s temporary regulations further provide that these categories of workers may be excluded by the employer from the definition of eligible employee. Therefore, it would be up to the local government to “elect” to exclude “emergency responders” from coverage under the EFMLEA.

The DOL’s temporary regulations define “emergency responders” who may be excluded from coverage as follows:

“anyone necessary for the provision of transport, care, health care, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.”

The DOL also posted guidance further advising that to minimize the spread of the virus associated with COVID-19, employers are encouraged to exercise good judgment in using this definition of “emergency responders” to exclude them from the provisions of the Act.

### **What are the REASONS justifying leave?**

Emergency FMLA Leave is available for a singular purpose: to allow an employee, ***who is unable to work or telework***, to care for the employee’s child under 18 years of age or child who is 18 years of age or older and incapable of self-care because of a mental or physical disability, if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

### **What is the DURATION of the Leave?**

An employee who has been employed for at least 30 days (before the first day of leave) may take up to **12 weeks of job-protected leave**.

### **Is the leave PAID or UNPAID?**

The **first two weeks of the leave is unpaid<sup>1</sup>**, unless the employee substitutes any accrued paid leave to cover some or all of the initial two-week period. After the initial two-week period, the employer must pay full-time employees **two-thirds of the employee's regular rate of pay** for the number of hours the employee would otherwise be normally scheduled to work.

### **Are there any CAPS on the Paid Leave?**

Yes. This pay entitlement is limited to no more than **\$200 per day** and **\$10,000 in the aggregate** per employee. However, the DOL's temporary regulations provide that if an employee elects or is required to use leave available to the employee under the employer's policies, such as vacation or personal leave or paid time off, concurrently with Emergency FMLA, the employer must pay the employee a full day's pay for that day.

### **Can the Emergency Paid Sick Leave (discussed below) be used during the FIRST TWO WEEKS?**

Yes.

<sup>1</sup> While the Act stated that the first "10 days" of Emergency FMLA Leave were unpaid, the DOL's temporary regulations implementing the Act state that the period of unpaid Emergency FMLA Leave is the initial "two weeks" of said leave.

**If we have a NO STACKING policy can we require the employee to utilize accrued leave when taking Emergency FMLA?**

While there is some inconsistency and contradictory language between the Act and the DOL's temporary regulations on the subject of when an employer can require an employee to use accrued leave such as paid time off ("PTO") under the employer's policies concurrently with Emergency FMLA Leave, the DOL's most updated interpretive guidance [posted on its website](#) indicates that an employer can require accrued PTO to be used concurrently during the paid portion of Emergency FMLA Leave that follows the first two weeks of Emergency FMLA Leave that are unpaid. During the first two weeks of Emergency FMLA Leave that is otherwise unpaid, the employee can either choose to use paid sick leave under the EPSLA (discussed below) or can choose to use other accrued PTO. While the employer cannot force the employee to use existing PTO concurrently with the employee's first two weeks of taking Emergency FMLA Leave, the employee may elect to do this and the employer can agree to this being done. After the first two weeks of being on Emergency FMLA Leave, the employer can then require, or the employee may elect to use, other accrued leave for the remainder of up to 10 weeks of EFMLEA concurrently with the paid period of EFMLEA (which would allow the employee to receive his or her full salary for the remaining portion of the Emergency FMLA Leave to make up the difference given that the paid portion of Emergency FMLA Leave would ordinarily pay two-thirds of the employee's regular rate of pay). With respect to taking paid sick leave under the EPSLA, however, the DOL's regulations are clear that an employer cannot require the employee to first exhaust accrued PTO before taking paid sick leave under the EPSLA or require an employee to concurrently use accrued PTO when electing to take paid sick leave under the EPSLA.

**How do you calculate the Paid Leave for NON-FULL TIME EMPLOYEES or EMPLOYEES WITH IRREGULAR WORK SCHEDULES?**

Employees who work part-time or irregular work schedules (i.e., employees who do not have a regular work schedule, but have a schedule that varies week to week to such an extent that an employer is unable to determine with certainty the number of hours week to week) should be paid based upon the average number of hours the employee was scheduled to work each workday for the six months prior to taking the Emergency FMLA. If an employee has worked less than six months prior to taking the Emergency FMLA, the pay should be calculated based upon the average number of hours the employee and employer

agreed to at the time of hiring that the employee would work each workday. If there was no such agreement, the scheduled number of hours is equal to the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

### **Is there a JOB RESTORATION requirement?**

Yes. Employers with 25 or more employees will have the same obligations as under traditional FMLA to restore an employee's job to the same or equivalent position upon return to work. Employers with fewer than 25 employees may be excluded from restoration requirements under certain circumstances if the position is no longer available due to an economic downturn or other circumstances caused by a public health emergency, but reasonable efforts must still be made and the employer must maintain contact with the employee for up to a year following the employee's leave in an effort to restore the employee to his/her equal or equivalent position. As under the traditional FMLA, an employee would not be protected from job restoration in the event of employment actions such as layoffs that would have affected the employee regardless of whether the employee took leave. However, in order to deny job restoration on such a basis, the employer would need to show that the employee would not otherwise have been employed at the time reinstatement is requested.

### **Are there specific forms that have been issued by the Department of Labor for use in requesting and approving Emergency Family Medical Leave?**

The Department of Labor has not issued any particular form. However, we have created forms that are available on this website for potential use by employers, and the [sample form used to request Emergency Family Medical Leave may be accessed here](#).

## **II. EMERGENCY PAID SICK LEAVE**

### **Who is a COVERED EMPLOYER and EMPLOYEE?**

The Act applies to **all** local governments. There is **no minimum period of employment** for an employee to be eligible.

### **Are there any EXEMPTIONS available?**

Yes. The Act provides that an employer of an employee who is a “health care provider or an **emergency responder**” may elect to exclude such employee from the Act. While these terms are not defined in the Act, they have been defined within the DOL’s issued temporary regulations. The DOL’s temporary regulations further provide that these categories of workers may be excluded by the employer from the definition of eligible employee. Therefore, it would be up to the local government to “elect” to exclude “emergency responders” from coverage under the Emergency Paid Sick Leave Act. In addition, the DOL’s temporary regulations implementing the Act provide for an exemption to small businesses with fewer than 50 employees from the requirements if compliance would “jeopardize the viability of the business as a going concern.”

The DOL’s regulations apply the same definition of “emergency responders” stated above in the context of the EFMLEA to “emergency responders” who may be excluded from coverage under the Emergency Paid Sick Leave Act.

### **What are the REASONS justifying leave?**

Emergency Paid Sick Leave is available for the following six 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 COVID-19 concerns;
- (3) The employee is experiencing COVID-19 symptoms and seeking medical diagnosis;
- (4) The employee is caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
- (5) The employee is caring for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to a public health emergency; or
- (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.

## **What is the DURATION of the Paid Sick Leave?**

A full-time employee is granted **eighty (80) hours of paid sick leave**. A part-time employee (defined under the Act as an employee whose average number of hours scheduled to work per workweek or hours normally scheduled to work per workweek is less than 40 hours per workweek) is granted the number of hours equal to the number of hours that such employee is normally scheduled to work over two workweeks. For example, if a part-time employee is scheduled to work 15 hours each week, the employee is entitled to 30 hours of paid sick leave.

The regulations specify different and more complex calculations for part-time employees with irregular work schedules, with different calculation methods depending on whether the part-time employee on an irregular work schedule has worked for the employer for at least six months.

With regard to a part-time employee with an irregular work schedule who has been employed for at least six months, that employee is entitled to up to the number of hours of paid sick leave that is equal to 14 times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes the paid sick leave, including any hours for which the employee took leave of any type.

With regard to a part-time employee with an irregular work schedule who has been employed for less than six months, that employee is entitled to up to the number of hours of paid sick leave that is equal to 14 times the average number of hours each calendar day that the employee and employer agreed the employee would work upon being hired. If there was no such agreement upon being hired, then such a part-time employee would be entitled to up to the number of hours of paid sick leave equal to 14 times the average number of hours per calendar day the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

## **How do you Calculate the PAYMENTS for Paid Sick Leave?**

The employer must pay the employee's **average regular rate of pay** if Emergency Paid Sick Leave is being taken pursuant to qualifying reasons (1), (2), or (3) above; or at **two-thirds** the employee's average regular rate of pay if the Emergency Paid Sick Leave is being taken pursuant to qualifying reasons (4), (5), or (6).

The DOL's aforementioned [frequently asked questions guidance document](#) also includes some particular examples in calculating paid sick leave for employees, including examples related to paid sick leave calculations for employees on irregular work schedules per the DOL's regulations.

**Are there any CAPS on the Paid Leave?**

Yes. This pay entitlement is limited to no more than **\$511 per day** and **\$5,100 in the aggregate** per employee when on leave for self-care pursuant to reasons identified in (1), (2), and (3) above; and limited to no more than **\$200 per day** and **\$2,000 in the aggregate** per employee when on leave for other reasons identified in (4), (5), and (6) above.

**Can the Emergency Paid Sick Leave be used during the FIRST TWO WEEKS of the Emergency FMLA Leave?**

Yes.

**Does Emergency Paid Sick Leave ACCRUE?**

No. The Act requires that the leave be available for “**immediate use**” for each employee “regardless of how long the employee has been employed by an employer.” As such, it is recommended that a separate leave bank for Emergency Paid Sick Leave be created for each employee as of April 1st, which is the effective date of the Act.

**Can we require an employee to UTILIZE OTHER PAID LEAVE before the Emergency Paid Sick Leave?**

No. The Act is clear that an employer **may not require** an employee to use other paid leave before taking advantage of the 80 hours of Emergency Paid Sick Leave.

**Does the Emergency Paid Sick Leave CARRY OVER if not used?**

No. Emergency paid sick leave **will not carry over** to the following year.

**Does the Emergency Paid Sick Leave need to get PAID OUT upon separation of an employee?**

No. The award of Emergency Paid Sick Leave is for specific purposes. As such, if a qualifying reason is not applicable and an employee separates, there is **no obligation to pay out sick leave** as you might provide for under your policies with respect to other traditional paid sick leave.

**Are there specific forms that have been issued by the Department of Labor for use in requesting and approving Emergency Paid Sick Leave?**

The Department of Labor has not issued any particular form. However, we have created forms that are available on this website for potential use by employers, and [the sample form for requesting Emergency Paid Sick Leave may accessed here](#).

**What about employees who may not be eligible for leave under the FFCRA or have exhausted all leave benefits under the FFCRA, but remain affected by reduced hours or an inability to report to work for COVID-19-related reasons?**

County governments may experience employees who are being impacted in terms of reduced hours or being unable to work for COVID-19-related reasons, but who are ineligible for leave benefits under the EFMLEA and/or EPSLA (for example, emergency responders determined by a county to be exempt from the FFCRA) or who have exhausted their leave benefits under the FFCRA. While those impacted employees would not be entitled to leave benefits under the EFMLEA and/or EPSLA, they may very well be eligible for unemployment insurance (UI) benefits through partial UI claim filing with the Georgia Department of Labor (GDOL). Additional information on partial UI claims under the

GDOL's [Emergency Rule](#), can be found in [Jarrard & Davis's separate Unemployment Insurance \(UI\) Benefits Related to COVID-19 summary document](#).

### III. INTERMITTENT LEAVE

#### **May an employee take paid sick leave or expanded family and medical leave intermittently while teleworking?**

Yes, if the employer allows it. The DOL has advised that intermittent leave may be taken in any increment, including less than full days, provided that the employee and employer agree. For example, if the employee and employer agree on a 90-minute increment, the employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

#### **May an employee take Emergency Paid Sick Leave intermittently while working at his or her usual worksite (as opposed to teleworking)?**

Yes, but it depends on why the employee is taking Emergency Paid Sick Leave and whether the employer agrees. If the employee working at the usual worksite is taking paid sick leave for the qualifying reasons under the Emergency Paid Sick Leave Act listed above as numbers (1), (2), (3), (4), and (6), that employee cannot take intermittent leave. Under those circumstances, the employee must continue to take paid sick leave each day until the employee either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave. This limit is imposed because if an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of the Act is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others in the workplace. However, if an employee working at the usual worksite is taking paid sick leave under the Emergency Paid Sick Leave Act for reason (5) above, intermittent leave would be allowed so long as it is agreeable to the employer and may be taken in full or partial day increments.

#### **IV. CONCLUSION**

As always, you are advised to consult with your County Attorney on any specific questions and applications of the laws as the information contained in this document should not be construed as legal advice. Please note that the legal landscape has been changing rapidly throughout the evolution of this pandemic virus, and you are advised to continue to seek updates. In particular, the Secretary of Labor may promulgate additional or updated regulations pursuant to the authorizations in the Act or further guidance to detail or further clarify certain of these employment laws, or otherwise provide for practical guidance. Moreover, the state of the law is continuing to evolve in connection with developments in public health recommendations and emergency orders on the State level. If you are an ACCG-IRMA member, you are also welcome to contact Angela Davis through the ACCG-IRMA HR Legal Services by visiting the ACCG website or by email to [adavis@jarrard-davis.com](mailto:adavis@jarrard-davis.com) or by phone at Jarrard & Davis, LLP at 678.455.7150.