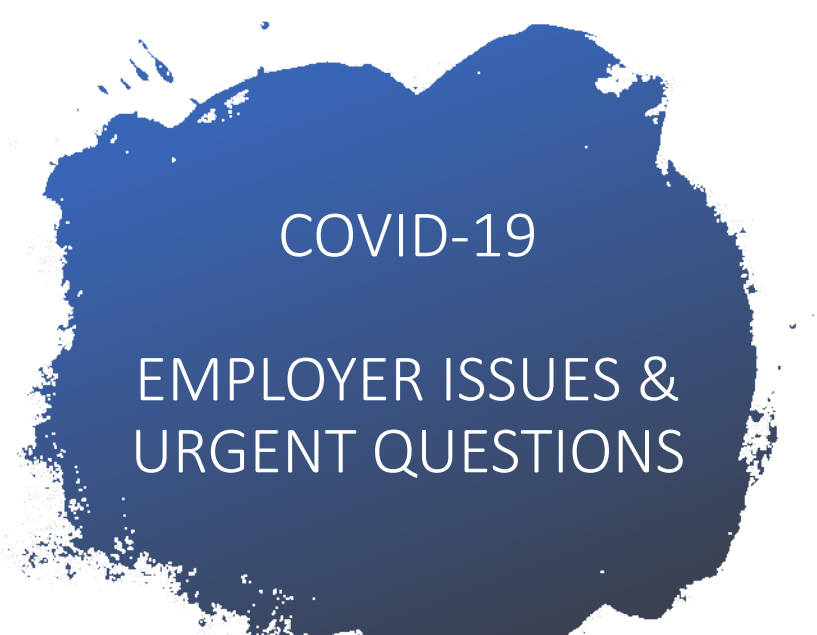


**COVID-19  
Employer Issues and Urgent Questions  
Webinar  
Friday, March 27, 2020  
10:00am**

Hosted by Annie Fairchild, CPA  
AFairchild PC  
[www.afairchildpc.com](http://www.afairchildpc.com)  
214-731-7664

Presented by Traci Clements, Attorney  
Ferguson, Braswell, Fraser, Kubasta PC  
[www.fbk.law](http://www.fbk.law)  
[tclements@fbk.law](mailto:tclements@fbk.law)  
972-378-9111



**COVID-19  
EMPLOYER ISSUES &  
URGENT QUESTIONS**

# Employer Issues & Urgent Questions

- THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT
  - TAX CREDITS
  - EMPLOYER REQUIREMENTS
  - PENALTIES
- ADDITIONAL CONSIDERATIONS TO REMEMBER
- Q/A

# Employer Issues & Urgent Questions

## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- DIVISION G – REFUNDS / TAX CREDITS
- DIVISION E – PAID SICK LEAVE
- DIVISION C – EXTENDED FAMILY MEDICAL LEAVE

# Families First Coronavirus Response Act

TAX CREDITS (Division G of the Act)

# Families First Coronavirus Response Act

TAX CREDITS (Division G of the Act)

Q: How Do Employers Get Reimbursed or Receive Tax Credits?

A: You retain it from the balance that you would have otherwise had to deposit with the IRS.

# Families First Coronavirus Response Act

## How Do Employers Get Reimbursed or Receive Tax Credits?

- Employers who pay Paid Sick Leave or Expanded FMLA leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS.
- The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes **with respect to all employees**.

# Families First Coronavirus Response Act

## How Do Employers Get Reimbursed or Receive Tax Credits?

- If you have insufficient payroll taxes to cover the cost of qualified sick and child-care leave paid, employers will be able file a request for an accelerated payment from the IRS.
- The IRS expects to process these requests in two weeks or less.
- Details to come next week.

# Families First Coronavirus Response Act

## What About Small Business Exemptions?

- To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department.
- More detail in forthcoming regulations.
- *Do not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.*

# Families First Coronavirus Response Act

## PAID SICK LEAVE (Division E of the Act)

- **EMPLOYEES – all full-time and part-time employees**

*Except an employee who is a healthcare provider, or who is an emergency responder may be excluded by the employer.*

- **CIRCUMSTANCES (6)**



# Families First Coronavirus Response Act

## CIRCUMSTANCES (6)

- (1) The Employee is subject to a federal, state, or local quarantine or isolation order.
- (2) The Employee has been advised by a health care provider to self-quarantine.
- (3) The Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- (4) The Employee is caring for someone else who is experiencing (1) or (2).
- (5) The Employee is caring for a son/daughter (under 18) because the school or childcare facility is closed.
- (6) The Employee is experiencing any other substantially similar condition specified by HHS, Treasury, or DOL.

# Families First Coronavirus Response Act

## CIRCUMSTANCES (6)

- (1) through (3) = relate to the Employee's own condition
- (4) through (6) = related to caring for someone else
- Up to 80 hours paid sick leave for full-time Employees
- Up to "2 weeks' average" for part-time Employees

**The Employer may not require the Employee to use his/her PTO**

## Families First Coronavirus Response Act

### How Much Do We Pay?

- (1) through (3) = 100% of the Employee's rate up to \$511/day not to exceed \$5,110 in the aggregate
- (4) through (6) = 2/3 (66.6%) of the Employee's rate up to \$200/day not to exceed \$2,000 in the aggregate

**The employer may pay more if it so chooses but will not be reimbursed beyond the rates above.**

## Families First Coronavirus Response Act

**Quarantine:** Compulsory separation, including restriction of movement, of *people who \*potentially have been exposed to a contagious disease*, until it can be determined whether they have become sick or no longer pose a risk to others. This determination could be made, for example, based on the time elapsed from their potential exposure.

**Isolation:** Separation of people *^known or suspected (via signs, symptoms or laboratory criteria) to be infected with a contagious disease* from those who are not sick to prevent them from transmitting the disease to others.

\*CDC uses "reasonably"    ^CDC uses "have been infected"

# Families First Coronavirus Response Act

FMLA EXPANSION (Division C of the Act)

# Families First Coronavirus Response Act

FMLA EXPANSION (Division C of the Act)

**Q: Can I deny the Employee paid sick leave if the Employee is already on PTO or other paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?**

**A: No.** The Emergency Paid Sick Leave Act imposes a *new* leave requirement on Employers, beginning on April 1, 2020.



## Families First Coronavirus Response Act

- Documentation (we don't yet have official forms from the DOL, so just get reasonable documentation from the Employee)
- Be reasonable/flexible – do not nitpick over forms. Err in favor of the Employee.

## Families First Coronavirus Response Act

### FMLA EXPANSION (Division C of the Act)

- Expansion of the FMLA that is **child-care specific**.
- **EMPLOYEES – all full-time or part-time employees who have worked for the company for at least 30 days.**

*Except an employee who is a healthcare provider, or who is an emergency responder may be excluded by the employer or the Secretary of Labor.*

# Families First Coronavirus Response Act

## FMLA EXPANSION (Division C of the Act)

- **EMPLOYERS** – all businesses under 500 employees.
- **Small businesses:** fewer than 50 employees, will be able to apply to the DOL for an exemption (see slide 7 in this deck).

# Families First Coronavirus Response Act

## FMLA EXPANSION (Division C of the Act)

### CIRCUMSTANCES (1)

- a school or child-care closure due to COVID-19, and that closure in and of itself will keep that employer at home and unable to work or telework.

**This is the same as Circumstance #5 under the Paid Sick Leave**

# Families First Coronavirus Response Act

FMLA EXPANSION (Division C of the Act)

## ACTS RUN CONCURRENTLY

- The paid sick leave will run concurrently with this FMLA benefit, so that 2 weeks of paid sick leave will count *toward* FMLA leave.

## DURATION

- 12 weeks under FMLA. This Act does **not** expand the 12-week limit; it only adds a way to get it, and forces the company to pay the employee while on FMLA leave for this one circumstance.

# Families First Coronavirus Response Act

FMLA EXPANSION (Division C of the Act)

## Q: How do the paid sick leave, FMLA expansion, and accrued PTO work together?

A:

- Paid Sick Leave is available for **immediate** use as of April 1. It runs concurrently with the expanded FMLA leave.
- If employee has PTO they can use it. We don't have confirmation yet if they can use it at 100% or if it is only to supplement their 2/3 base rate. Guidance should be forthcoming.
- Whatever leave policies you have in place now, are locked in – frozen in place.

# Families First Coronavirus Response Act

FMLA EXPANSION (Division C of the Act)

- **First 10 days** of leave is **unpaid**.
- If the need continues, the employee can go into **paid** leave.
- Paid leave is 2/3 the employee's base rate **up to \$200/day** and **\$10,000** in the aggregate.

**Employee's choice to use their accrued PTO. The employer cannot require it.**

# Families First Coronavirus Response Act

FMLA EXPANSION (Division C of the Act)

EXAMPLE



# Families First Coronavirus Response Act

FMLA EXPANSION (Division C of the Act)

## DOCUMENTATION

- Official documentation should be forthcoming.
- This is not the time to nitpick about documentation. Anything that will verify the need for leave will suffice (for ex: a text message or Facebook post from the school, or an order from the county to close all schools).

# Families First Coronavirus Response Act

FMLA EXPANSION (Division C of the Act)

## JOB RESTORATION

- 26+ employees = standard FMLA job restoration
- 25 or fewer employees are **not** guaranteed job restoration if =
  - Job no longer exists when employee comes back
  - Because of some economic reason related to COVID-19
  - Employer continues *for a year* to keep that person in mind and presumably keep reaching out to give this employee first choice



# Families First Coronavirus Response Act

## PENALTIES FOR NON-COMPLIANCE

### EXPANDED FMLA

- If Employer has < 50 Employees, only the DOL can enforce.
- If Employer has > 50 Employees, both the DOL and the employee can enforce.
- Re-employment, re-instatement, promotion, back wages, fees, costs, attorneys' fees.

### PAID SICK LEAVE

- Failure to pay is considered failure to pay minimum wage under the FLSA, which would include liquidated damages of two-times the amount owed and attorneys' fees.

## ADDITIONAL CONSIDERATIONS TO REMEMBER

- Workplace Safety
  - Employer Requirements
  - Employee obligation
- Benefits
- Company Insurance Policies
- Avoid Discrimination

## Workplace Safety

- Employer Obligations
  - Duty to create safe work environment
  - OSHA
  - Reasonable efforts
- Employee Responsibilities
  - Comply with all standards, rules, regulations, orders and policies
  - Refusal limited to imminent danger
  - Do not come to work sick

## Benefits

- Retirement plans
  - Safe harbor hardship distributions
- Group health insurance
  - HDHP with HAS – see IRS Notice 2020-15
  - Self-insured: stop loss / gap coverage
  - Check all plan levels

## Benefits

- Workers' compensation
  - Not covered if not in the course of work
- Disability coverage
- Unemployment benefits

## Company Insurance Policies

- EPLI
- General liability
- Cyber security
- Business interruption

## Avoiding Discrimination

- Title VII and State equivalent laws
- ADA
- FMLA
- **MESSAGE FROM EEOC CHAIR JANET DHILLON ON NATIONAL ORIGIN AND RACE DISCRIMINATION DURING THE COVID-19 OUTBREAK**

## Helpful Links

[https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)

[https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#\\_ftnref2](https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#_ftnref2)

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

<https://www.dol.gov/agencies/whd/flsa/pandemic>

## Helpful Links

<https://www.wilmerhale.com/en/insights/client-alerts/20200316-new-osha-coronavirus-guidance-for-employers-what-you-need-to-know>

<https://www.osha.gov/penalties>

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

<https://www.govinfo.gov/content/pkg/BILLS-116hr6201enr/pdf/BILLS-116hr6201enr.pdf>



## FERGUSON BRASWELL FRASER KUBASTA PC

2500 Dallas Parkway  
Suite 600  
Plano, Texas 75093

Traci Clements  
[tclements@fbfk.law](mailto:tclements@fbfk.law)

Phone: (972) 378-9111  
Direct: (972) 826-4466

