Families First Coronavirus Response Act (FFCRA): FAQs for hotel owners & operators Need to Know About Employee Rights

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Note: If you are an individual consumer with coronavirus-related travel issues, please do NOT contact us! We do not represent individual consumers. We advise businesses on major contracts, investments and financing.

Following the enactment of the Families First Coronavirus Response Act on March 18, 2020, the Department of Labor has clarified which employers will be impacted by the Act and how they can comply with its mandates. Marta Fernandez, hotel lawyer and a partner in JMBM’s Labor & Employment department, has answered some of the most frequently asked questions by employers about the Act which goes into effect on April 1, 2020.

**What hotel owners and operators need to know about employee rights under the FFCRA**

by

Marta Fernandez

Frequently Asked Questions or FAQs about employee rights under the Families First Coronavirus Response Act

Effective April 1, 2020 and continuing through December 31, 2020, covered employers need to begin complying with the mandates of the Families First Coronavirus Response Act (“FFCRA” or “Act”). You can find our original article explaining the FFCRA here. Since the law’s enactment on March 18, 2020, the Department of Labor has clarified and expanded upon what precisely is required under the Act and of whom it is required. Below are some of the questions we have been receiving from clients. The answers provided reiterate some of the previously announced requirements, and incorporate the additional guidance that has been issued by the Department.

#1 What obligations do covered employers have under the FFCRA?

Covered employers must provide eligible employees with up to 80 hours of emergency paid sick leave and up to 12 weeks of emergency family and medical leave.

#2 When is an employee eligible to receive paid sick leave under the FFCRA?

Under the FFCRA, a full-time employee may qualify for 80 hours of paid sick leave (or, for a part-time employee – the average number of hours that the employee works over a typical two-week period) where the employee is unable to work, or telework, due to a need for leave because the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. Is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. Is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

#3 How much compensation is an employee entitled to receive under the paid sick leave provisions of the FFCRA?

Employees taking leave for reasons 1, 2, or 3, noted above must be paid at either their regular rate or the applicable minimum wage, whichever is higher, with a cap of $511 per day and $5,110 in the aggregate.

Employees taking leave for reasons 4, 5, or 6 above must be paid at two-thirds their regular rate or two-thirds the applicable minimum wage, whichever is higher, with a cap of $200 per day and $2,000 in the aggregate.

The Department has now clarified that an employee’s regular rate of pay is the average of the employee’s regular rate over a period of six months prior to the date on which he or she takes leave.

#4 Can I require employees to substitute any accrued paid time off for the emergency paid sick leave?

No. While employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the emergency paid sick leave, you cannot require employees to do so.

#5 What if I've already provided my employees with paid leave for a COVID-19 related reason?

The emergency paid sick leave is to be provided in addition to any other paid leave that an employer has already provided to its employees. Thus, leave taken prior to April 1st does not count towards the leave required under the Act.

#6 When is an employee eligible to receive emergency family and medical leave under the FFCRA?

Covered employers must provide employees who have been employed for at least 30 days (meaning that an employee was on payroll for the 30 calendar days immediately prior to the day his or her leave would begin) with up to 12 weeks of emergency family and medical leave.

This emergency family and medical leave is only available where the employee is unable to work, or telework, due to a need for leave to care for a child whose school or child care provider is closed or unavailable due to COVID-19 related reasons. Employees who need to take leave for some other COVID-19 related reason would not be covered under this provision, though they may be eligible for emergency paid sick leave under the Act.

#7 If my business has shut down, are employees still entitled to paid sick leave and/or emergency family and medical leave under the Act?

No. If your business has been closed for lack of business or because it was required to close under a federal, state, or
local order, and employees are not currently working, they are not entitled to either paid sick leave or emergency family and medical leave. Similarly, furloughed employees are not entitled to paid sick leave or emergency family and medical leave.

Relatedly, if an employee’s scheduled hours have been reduced because there is not enough work to fill the employee’s normal hours, the employee is not entitled to paid sick leave or emergency family and medical leave for the hours he or she is no longer scheduled to work.

**#8 How much compensation is an employee entitled to receive under the emergency family and medical leave provisions of the FFCRA?**

The first two weeks of the 12 weeks of emergency family and medical leave can be unpaid, though an employee may elect to use existing vacation, personal, or medical or sick leave provided under the employer’s policy during this time. For the subsequent 10 weeks, employees must be paid two-thirds of their regular rate for the hours they would be normally scheduled to work with a cap of $200 per day or $10,000 in the aggregate.

Note that when calculating an employee’s pay for the purposes of complying with this provision of the Act, you must include overtime hours that an employee would normally have been scheduled to work. However, employees are not entitled to the overtime premium since the time is not actually worked.

**#9 Am I a covered employer under the FFCRA?**

The emergency paid sick leave and emergency family and medical leave provisions of the FFCRA apply to certain public employers, government employers (except those federal government employers whose employees are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act and are therefore not covered by the emergency family and medical leave provisions), and private employers with fewer than 500 full time and part time employees.

**#10 How do I count my employees?**

The Department of Labor has clarified that when counting the number of employees it has, an employer should include employees who are on leave, temporary employees who are employed jointly by the employer and another employer, and day laborers supplied by a temporary agency.

The Department of Labor has further clarified that a corporation is typically considered to be a single employer and each of its employees must be counted towards the 500 employee threshold. However, where a corporation has an ownership interest in another corporation, the two corporations are considered separate employers unless they satisfy the integrated employer test under the FLSA, in which case, all common employees must be counted towards the 500 employee threshold.

Generally, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993. If two entities satisfy this test, then employees of all entities making up the integrated employer should be counted towards the 500 employee threshold.
#11 How does the exemption for businesses with fewer than 50 employees work?

Businesses with fewer than 50 employees may be exempt from the paid sick leave and/or the expanded family and medical leave requirements. This exemption only applies where the leave is requested because the employee’s child’s school or place of care is closed, or child care provider is unavailable due to COVID-19 related reasons and where an authorized officer of the business has determined that at least one of the following three conditions has been satisfied:

1. The provision of paid sick leave or expanded family and medical 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;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The Department of Labor has made it clear that employers should not send any materials to the Department of Labor. Rather, they should document why their business with fewer than 50 employees satisfies one or more of the three conditions above.

#12 Are health care providers and emergency responders exempt from paid sick leave and/or emergency family and medical leave under the Act?

Yes. The Act provides that an employer of an employee who is a healthcare provider or emergency responder may elect to exclude such employee from the application of both the family and medical leave provisions and the paid sick leave provisions of the Act.

Additionally, the Act provides that the Secretary of Labor has the authority to issue regulations excluding certain health care providers and emergency responders from certain requirements of the Act. The Secretary of Labor has not yet issued any such regulations.

#13 Which employees count as “health care providers” who can be excluded from paid sick leave and/or emergency family and medical leave?

The Department of Labor has defined “health care provider” to include 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 care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
The Department’s definition of health care provider also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility. It also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. It also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

**#14 Which employees count as “emergency responders” who can be excluded from paid sick leave and/or emergency family and medical leave?**

The Department of Labor has defined “emergency responder” to mean an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19, including but 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, 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.

The definition of emergency responder also includes any individual that 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.

**#15 Do I have to notify employees of these new leave entitlements?**

Yes. The required workplace poster notifying employees of their rights under the FFCRA, which must be posted in a conspicuous place on the employer’s premises, has now been published by the Department in both English and Spanish and can be found here (click links to download a PDF):

- English
- Spanish

The poster to be used by federal government employers can be found here (click links to download a PDF):

- English
- Spanish

For employees who are telecommuting, the posting requirement may be met by emailing or direct mailing the poster to those employees, or by posting it on the employer’s website.

**#16 Can my business take advantage of the Paycheck Loan Protection Program?**
If the employer was in business prior to February 15, 2020 and employs 500 or fewer employees, the business may be eligible for a paycheck loan. There are some limited exceptions whereby businesses outside of this definition may be eligible. The loan is non-recourse except to the extent that the borrower uses the proceeds for a purpose not authorized under the act and no personal guaranty is required.

The loan can be used for (i) payroll costs; (ii) health care benefits and insurance premiums; (iii) sick, family and medical leave payments; (iv) employee salaries and commissions; (v) interest on any mortgage obligation; (vi) rent under a lease agreement; (vii) utilities; and (viii) interest on any other debt incurred before the covered period.

More details about the program can be found in our earlier alert here.

**#17 Is my business eligible for an employee retention credit?**

The Employee Retention Credit (ERC) is available to employers of all sizes. It provides a payroll tax credit for 50% of wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers (i) whose operations were fully or partially suspended, due to a COVID-19-related shut-down order, or (ii) whose gross receipts declined by more than 50% when compared to the same quarter in the prior year.

More details about the credit can be found in our earlier alert here.

The rules and regulations applicable to employers during the COVID-19 pandemic continue to change very quickly. Employers should follow developments closely and consult with counsel about how these rules and regulations may affect them, and how other changes in their business may trigger additional obligations under existing law.

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Marta Fernandez is a partner in JMBM’s Employment and Labor Department and a senior member of JMBM’s Global Hospitality Group®. As a management labor lawyer with more than 20 years of experience, Marta specializes in representing hospitality industry clients in all aspects of labor and employment including labor-management relations such as union prevention, collective bargaining for single as well as multi-employer bargaining units, neutrality agreements and defense of unfair labor practice charges before the NLRB. She defends employers in administrative and litigation claims, such as employee claims of sexual harassment and discrimination and counsels clients in preventative strategies such as executive training, arbitration enforcement, and policies and procedures. For more information, please contact Marta Fernandez at 310.201.3534 or at mfernandez@jmbm.com.

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