

COVID-19 Response: United States

GOVERNMENT MEASURES FOR BUSINESSES

Families First Coronavirus Response Act

- ▶ expands the Family and Medical Leave Act (“FMLA”) to provide for emergency paid leave benefits for certain employees
- ▶ requires the provision of paid sick leave to certain employees
- ▶ provides a limited tax credit to employers for the provision of such FMLA and sick leave and exempts those wages from the employer portion of Social Security taxes
- ▶ requires all employer-sponsored group health plans to provide coverage, without any cost-sharing, for the testing of COVID-19

DESCRIPTION

Applicable Employers

The FMLA leave and paid sick leave portions of the Act only apply to employers with fewer than 500 employees (though unpaid FMLA leave remains available to employees of employers with 500 or more employees to the same extent as prior to the Act).

- ▶ While not specified in the Act, it is likely that employees of all “integrated employers” (which is a fact specific inquiry, but essentially groups together operating companies that are integrated operationally, e.g., common supervisors, HR functions and policies and decision makers), will count toward the 500 employee threshold.

FMLA Leave

Employees can take FMLA leave for COVID-19-qualifying reasons (described below). The first 10 days of FMLA leave taken for qualifying reasons is unpaid (though employees can use accrued paid time off or sick leave (including mandated sick leave described below)), but the employer is required to pay employees for the remaining 10 weeks at a rate of 2/3 of the employee’s regular rate of pay, capped at \$200 per day and \$10,000 in the aggregate.

- ▶ COVID-19 qualifying reasons are that the employee is unable to work or telework due to a need to care for a minor child because such child’s school, place of care or regular childcare provider is closed or unavailable due to COVID-19.

Paid Sick Leave

Employees are entitled to two weeks of paid sick leave paid at the employee’s regular rate (capped at \$511 per day and \$5110 in the aggregate) if the employee cannot work or telework because the employee (a) is subject to a quarantine or isolation order related to COVID-19, (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 or (c) is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

- ▶ However, sick leave must only be paid at 2/3 the employee’s regular rate (capped at \$200 per day and \$2000 in the aggregate) if the employee cannot work or telework because the employee (a) is caring for an individual who (i) is subject to a quarantine or isolation order related to COVID-19 or (ii) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or (b) is caring for a child whose school or place of care has been closed, or whose regular childcare provider is unavailable, due to COVID-19 precautions.
- ▶ While not explicitly stated in the Act, it appears that this paid time off can be used during the otherwise unpaid 10 days of FMLA leave described in the FMLA Leave section above, such that an employer would be responsible for up to approximately 12 weeks of paid leave total (at least 10 of which would be at 2/3 the employee’s regular rate of pay).

WHEN?

[20 April 2020]
(exact date tbc)

COVID-19 Response: United States (Continued)

GOVERNMENT MEASURES FOR BUSINESSES

Families First Coronavirus Response Act (continued)

DESCRIPTION (CONTINUED)

- ▶ Employees may use paid sick leave under the Act prior to any existing paid time off entitlements accrued by the employee.

Terminations of Employment and Furloughs

Although not specifically addressed in the Act, if an employee becomes eligible for coverage under the Act while actively working, it is unlikely that an employer can lawfully terminate the employee's employment solely to prevent the employee from receiving benefits under the Act. However, if there are legitimate business reasons for the termination of employment, such as the termination of employment of all employees in a specific department or the permanent closure of a facility, an employer may be able to terminate an employee who is taking a protected leave.

- ▶ The Act does not prohibit terminations of employment for legitimate business reasons where employees are not eligible for leave. The Act also does not address whether furloughed employees can or should remain eligible for benefits under the Act if they have been furloughed or are eligible for benefits if they experience a qualifying paid leave event after the furlough begins.

Employer Tax Credit

Employers will receive a refundable tax credit (against the employer portion of Social Security taxes) for the amounts required to be paid to employees as described in the FMLA Leave and Paid Sick Leave sections above, up to specific per-employee maximum per-day amounts (up to \$200 per day for FMLA leave and up to \$200 or \$511 per day for paid sick leave, depending on the reason for the leave) and specific per-employee maximum aggregate amounts (up to \$10,000 for FMLA leave and up to \$5,110 for paid sick leave).

- ▶ The employer portion of Social Security taxes is not imposed on the amounts required to be paid to employees. Although Medicare taxes are imposed on such amounts, the employer portion of Medicare taxes is also creditable against the employer portion of Social Security taxes and is otherwise refundable.
- ▶ These tax credits, along with the exemption from the employer portion of Social Security taxes on these wages, should generally offset the employer's cost of these additional FMLA leave and paid sick leave wages (although there may be timing lags between when the leave wages are paid and when the employer receives the cash benefit of the credits).
- ▶ Employers also receive a credit for certain amounts paid or incurred to provide and maintain a group health plan, to the extent allocable to the qualified family leave wages or qualified sick leave wages as determined by Treasury..

WHEN?

[20 April 2020]
(exact date tbc)

COVID-19 Response: United States (Continued)

GOVERNMENT MEASURES FOR BUSINESSES	ELIGIBILITY (CONTINUED)	WHEN?
<p>Families First Coronavirus Response Act (continued)</p>	<p>COVID-19 Testing Costs</p> <ul style="list-style-type: none"> ▶ All employer health plans must cover the cost of COVID-19 testing for plan participants (whether employees or their covered dependents) without any cost sharing (such as deductibles, copayments or coinsurance). Employers with self-insured plans will experience an increase in costs under their health plans to pay for this testing without any cost sharing. Employers with fully insured health plans should not have any immediate increased costs, but may see increases in premium costs related to the testing upon the health plan renewal. 	<p>[20 April 2020] (exact date tbc)</p>
<p>Federal Reserve FOMC Statement</p> <p>On 23 March 2020, the Federal Reserve's Federal Open Market Committee announced further actions to support the flow of credit to households and businesses, including:</p>	<ul style="list-style-type: none"> ▶ The Federal Reserve will increase its holdings of Treasury securities and agency mortgage backed securities in the amounts needed to support smooth market functioning ▶ Primary Market Corporate Credit Facility to provide liquidity to U.S. financial and nonfinancial businesses through loan and bond financing ▶ Secondary Market Corporate Credit Facility to purchase bonds issued by U.S. companies with investment grade debt ratings and certain U.S.-listed ETFs in the secondary market ▶ Term Asset-Backed Securities Loan Facility to provide loans to U.S. companies that are secured by certain eligible consumer and small business asset-backed securities ▶ Expansion of the Money Market Mutual Fund Liquidity Facility and Commercial Paper Funding Facility ("CPFF") to include a wider range of securities and reducing the pricing of CPFF 	<p>23 March 2020</p>
<p>Other</p>		
<ul style="list-style-type: none"> ▶ This document only summarizes key measures implemented to benefit businesses operating in the US. The government has taken other steps to bolster the economy as a whole (e.g., rate cuts), keep people safe (isolation) and assist individuals in financial difficulty as a result of COVID-19, which will also impact certain businesses. ▶ The measures described above were announced or in place as of 23 March 2020. ▶ Unlike other jurisdictions, the government is yet to propose changes to insolvency laws and the courts have yet to announce prolonged closures due to COVID-19. Directors should, therefore, continue to be mindful of their directors' duties and that the usual test of when to file for insolvency will continue to apply. 		