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Federal and State Leave Considerations for Employers During the COVID-19 Crisis

Presented by:

Kathleen A. McGinley

Baltimore | (410) 415-2085

Kathleen.McGinley@jacksonlewis.com

Judah L. Rosenblatt

Baltimore | (410) 415-2012

Judah.Rosenblatt@jacksonlewis.com

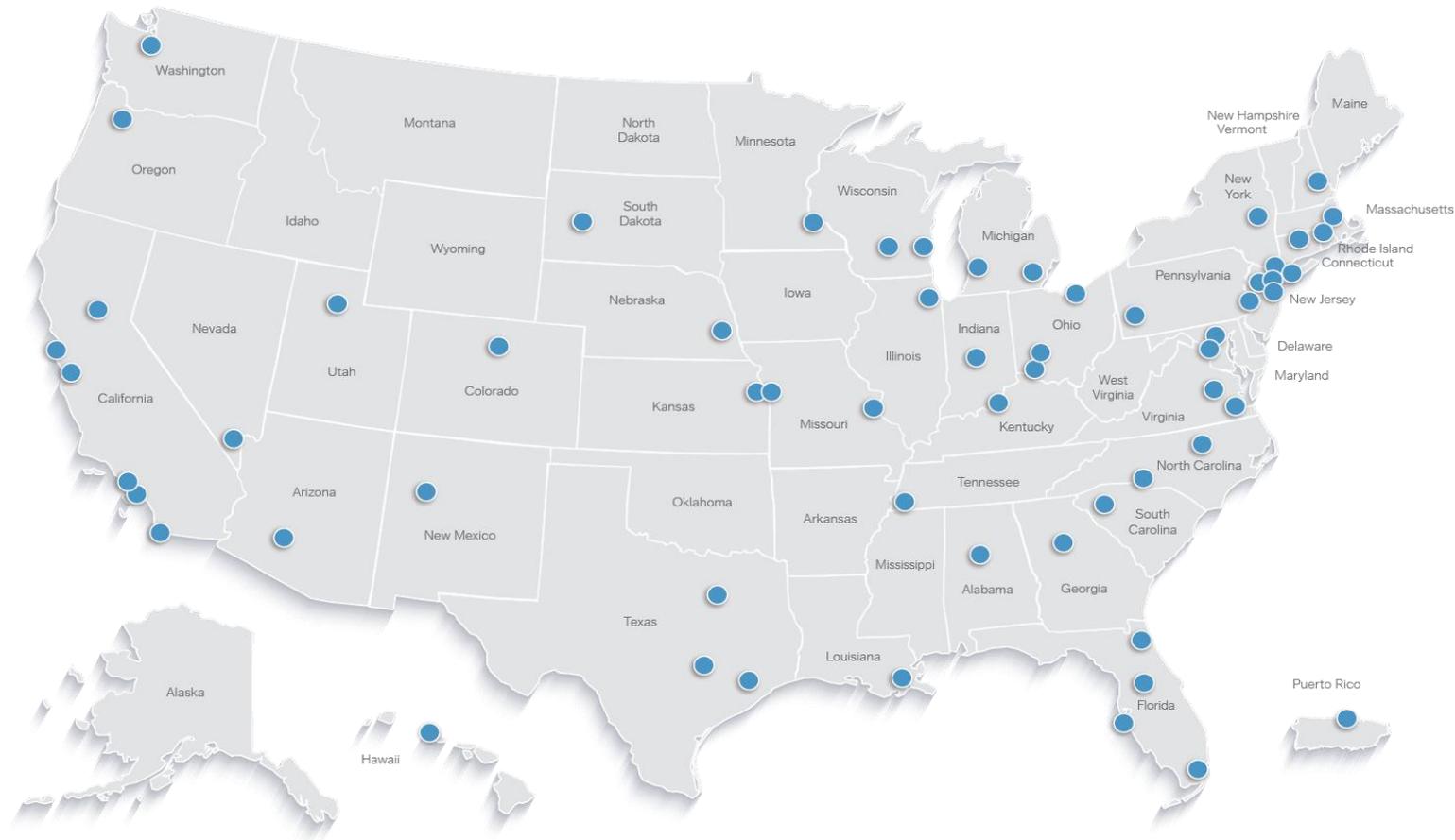
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The Families First Coronavirus Response Act

The Families First Coronavirus Response Act

The Basics

- Signed by President Trump on March 18, 2020
- Applies to private employers with fewer than 500 employees and most public employers
- Effective April 1, 2020 to December 31, 2020
- Includes two leave provisions:
 - **Emergency Family & Medical Leave Expansion Act** – provides for up to 12 weeks of FML, 10 weeks paid at 2/3 the employee's regular rate
 - **Emergency Paid Sick Leave Act** - provides 80 hours of PSL (or 2 week equivalent for part time employees) paid at either 2/3 or 100% of the employee's regular rate depending on the reason leave is taken
- Employees who take PSL or PFML are entitled to continued coverage under their employer's group health plan on the same terms as if they did not take leave

The Families First Coronavirus Response Act

The Basics

- Exceptions exist for health care providers and emergency responders
- Terms are defined by DOL very broadly, but it is possible further action could narrow the definitions
- Employers with less than 50 employees are exempt from providing PSL and PFML when the provision of leave would jeopardize their business as a going concern
 - This **only** applies to PFML or PSL due to need to care for a child whose school or place of child care has closed
 - An authorized officer of the employer must document the statutory basis for the exemption and retain that documentation
- Covered employers must post the DOL's new notice
- Employers are permitted to satisfy the posting requirement by mailing, emailing or posting the notice to their typical posting wall or to an employee intranet

The Families First Coronavirus Response Act

The Basics

- Job restoration to the same or equivalent position is required for both PFML and PSL
- For PFML only, job restoration exception for employers with less than 25 employees if:
 - position no longer exists due to economic conditions or other changes in operations caused by COVID-19 health crisis;
 - employer made reasonable efforts to restore the employee to an equivalent position, with equivalent pay, benefits and other terms and conditions; and
 - employer made reasonable efforts to contact the employee if an equivalent position, with equivalent pay, benefits etc. became available within a 1-year period beginning on the earlier of the date the need for leave ended, or 12 weeks after the date the employee's leave started
- FMLA's limitation on job restoration for "key" employees applies to PFML

The Families First Coronavirus Response Act

The Basics

- Goal of FFCRA is to allow employees to take leave so they will not spread COVID-19
- If the employer agrees, PFML and PSL can be taken intermittently to care for a son or daughter whose school or child care closed due to COVID-19, regardless of whether the employee is working at the workplace or remotely
- If the employer agrees, PSL for other reasons can be taken intermittently, but **only** if the employee is working remotely

New Emergency FMLA for COVID19

How Much Leave and Reasons for Leave

- Applies to all employees who have been employed for 30 calendar days
- Employees can take up to 12 weeks of FML for a “qualifying need related to a public health emergency.” A “public health emergency” means emergency with respect to COVID-19 declared by a federal, state, or local authority
- PFML counts toward the usual 12 workweeks of FML for FML covered employers

New Emergency FMLA for COVID19

How Much Leave and Reasons for Leave

- A qualifying need occurs when an employee is ***unable to work or telework due to need for leave to care for a son or daughter who is under 18 (or older and incapable of self care due to disability) if:***
 - the elementary or secondary school or place of care has been closed, or
 - the child care provider of such son or daughter is unavailable, due to a public health emergency.
- A child care provider is limited to a provider who receives compensation for providing child care services on a regular basis, unless the caregiver is a family or friend who regularly provides care
- If need for leave is foreseeable, then employee must give such notice as is practicable

New Emergency FMLA for COVID19

How Is Pay For Leave Calculated

- The initial 2 weeks may be unpaid
- During the first 2 weeks, an employee may elect to substitute any accrued vacation leave, personal leave or paid time off (including the new paid sick leave)
- After the first 2 weeks, an employee may elect or an employer may require an employee to substitute accrued leave that, under the employer's policies, would be available to employee to care for a child, such as vacation or personal leave or paid time off. This substitution must bring the employee up to full pay, but the employer cannot take a tax credit for the amount of substituted paid leave.
- Remaining FML days must be paid based on:
 - 2/3 the greater of employee's regular rate of pay or applicable minimum wage
 - Number of hours the employee would otherwise have been normally scheduled to work
 - Capped at \$200/day and \$10,000 in the aggregate

New Emergency FMLA For COVID19

The Regular Rate

- The regular rate of pay for both PSL and PFML is meant to be representative of the employee's regular rate from week to week
- For the calculation use the shorter of:
 - 6-month period ending on the date on which the employee takes PSL or PFML or
 - The entire period of employment
- Add all of the earnings that are not excluded from the regular rate under the FLSA
- Divide those wages by all of the hours worked, just as the regular rate for overtime purposes is calculated.

New Emergency FMLA for COVID19

Hours An Employee Is Regularly Scheduled To Work

- Employers pay employees based on their “scheduled number of hours”
- If employees have a normal weekly schedule, the scheduled number of hours are the hours they are normally scheduled to work, including days employee takes any kind of leave
- If employees’ work schedules vary, employers calculate scheduled number of hours using one of several methods
 - For employees who have worked at least 6 months: Use the 6 month average number of hours employee was scheduled to work each workday
 - For employees who have worked less than 6 months: Use the average number of hours the employer and employee agreed employee would work each workday OR if no agreement, the average number of hours per workday employee was scheduled to work during the entire period of employment

New Emergency Paid Sick Leave Act

The Basics

- All employees of covered employers are immediately eligible for PSL
- There is no carry-over or payout upon separation
- Employers cannot require an employee to search for or find a replacement
- Employees **may** use PSL in addition to any other leave benefit they may be entitled to receive under (1) any other federal, state, or local law; (2) a collective bargaining agreement; or (3) an employer policy that existed prior to April 1, 2020
- The only exception is that PSL will run concurrently with PFML used to care for a child whose school or child care provider has closed due to COVID-19
- After the first workday (or portion thereof) an employee receives PSL, an employer may require the employee to follow reasonable notice procedures in order to continue receiving PSL

New Emergency Paid Sick Leave Act

The Basics

- PSL is only available if employees are ***unable to work or telework due to need for leave due to a qualifying reason***
- Employers cannot require that employees use other paid leave made available by their policies before an employee uses their PSL under the new law.
- Employers calculate the regular rate of pay the same as for PFML, i.e. average for the shorter of 6 months or entire period of employment.

New Emergency Paid Sick Leave Act

How Much PSL For Full-Time Employees

- Full time employees can take 80 hours of PSL
- Full-time employees are those who are regularly scheduled to work 40 hours a week
- Employees who do not have a normal weekly schedule are considered full-time if the average number of hours per workweek the employee is scheduled to work, including hours for which the employee took leave of any type, is at least 40 hours per workweek over a period of time that is the lesser of:
 - the six-month period ending on the date on which the employee takes PSL; or
 - the entire period of the employee's employment.

New Emergency Paid Sick Leave Act

How Much PSL For Part-Time Employees

- Part-time employees can take PSL for 2-weeks based on the average number of hours an employee works over a 2-week period
- Part-time employees are those who are regularly scheduled to work less than 40 hours a week
- If part-time employees have a normal weekly schedule, they are entitled to an amount of PSL equal to the number of hours they normally are scheduled to work over the 2-week period

New Emergency Paid Sick Leave Act

How Much PSL For Part-Time Employees

If part-time employee do not have a normal weekly schedule, PSL is calculated based on one of the following

- Employee has worked 6 months: 14 times the average number of hours employee was scheduled to work each calendar day over the six-month period immediately prior to PSL being taken, including any leave hours taken
 - Employee has worked less than 6 months:
 - 14 times the number of hours the employer and employee agreed the employee would work on average, each calendar day, at the time of an employee's hiring, including leave hours taken
- OR
- If no agreement at the time of hiring, employers should provide 14 times the average number of hours per calendar day employee was scheduled to work over the entire period of their employment, including leave hours taken

New Emergency Paid Sick Leave

PSL Reasons, Rate of Pay, and Caps

Reason

(1) Employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19

(2) Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19

(3) Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis

Rate of Pay

(1) Regular rate of pay

(2) Regular rate of pay

(3) Regular rate of pay

Caps

(1) \$511/day and \$5,110 aggregate

(2) \$511/day and \$5,110 aggregate

(3) \$511/day and \$5,110 aggregate

New Emergency Paid Sick Leave

PSL Reasons, Rate of Pay, and Caps

Reason

(4) Employee is caring for an individual who is subject to a federal, state or local quarantine or isolation order due to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19

(5) Employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of the son or daughter is unavailable, due to COVID-19 precautions

(6) Employee is experiencing any other substantially similar condition specified by the Secretary of HHS

Rate of Pay

(4) 2/3 Regular rate of pay

(5) 2/3 Regular rate of pay

(6) 2/3 Regular rate of pay

Caps

(4) \$200/day and \$2,000 aggregate

(5) \$200/day and \$2,000 aggregate

(6) \$200/day and \$2,000 aggregate

Jackson Lewis FFCRA: PSL and PFML Comparison Chart

	PFML	PSL	Rate	Cap
REASONS FOR LEAVE				
Employee is subject to quarantine or isolation order	No	Yes	Regular rate of pay or minimum wage, if greater per FFCRA	\$511/day \$5,110 aggregate
Employee was told to self-quarantine by health care provider due to COVID-19	No	Yes	Regular rate of pay or minimum wage, if greater per FFCRA	\$511/day \$5,110 aggregate
Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis	No	Yes	Regular rate of pay or minimum wage, if greater per FFCRA	\$511/day \$5,110 aggregate
Employee is caring for an individual who is subject to a quarantine or isolation order, or has been advised to self-quarantine	No	Yes	2/3 regular rate of pay or minimum wage, if greater per FFCRA	\$200/day \$2,000 aggregate
Son or daughter's school or place of child care is closed due to COVID-19	Yes	Yes	2/3 regular rate of pay or minimum wage, if greater per FFCRA	\$200/day (after first 10 days) \$2,000 aggregate (PSL) \$10,000 aggregate (PFML)
Employee is experiencing other substantially similar condition specified by the Secretary of Health and Human Services	No	Yes	2/3 regular rate of pay or minimum wage, if greater per FFCRA	\$200/day \$2,000 aggregate

PSL No. 1: Are Shelter In Place And Stay At Home Orders The Same As A Quarantine Or Isolation Orders?

- Quarantine and isolation orders include shelter-in-place and stay-at-home orders issued by any federal, state, or local government authority *that cause the employee to be unable to work, even though their employer has work that the employee could perform but for the order*
- This also includes when a federal, state, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine
- To qualify for leave:
 - 1.employers must have work for the employee to do;
 - 2.employers must allow or permit the employees to do work; and
 - 3.employees must be unable to perform the work *because of* the quarantine or isolation order.

PSL No. 2: Can Employees Who Take Off Due To Underlying Health Conditions Receive PSL?

- PSL is triggered if:

A health care provider advises employees to self-quarantine based on a belief that:

- The employee has COVID-19;
- The employee may have COVID-19; or
- *The employee is particularly vulnerable to COVID-19*

and

Following their health care provider's advice to self-quarantine prevents the employee from being able to work, either at their normal workplace or by teleworking

PSL 3: Can An Employee Receive PSL If They Have COVID-19 Symptoms But Haven't Sought Diagnosis?

- PSL is limited to the time employees are unable to work because they are taking affirmative steps to obtain medical diagnoses for COVID-19
- PSL is not available if employees are self-quarantining without seeking a medical diagnosis or if employees are able and permitted to telework while waiting for test results
- Employees may continue to take PSL while experiencing symptoms or after testing positive for COVID-19, regardless of symptoms, provided their health care providers advise them to self-quarantine

PSL 4: Who Is An Individual For Whom An Employee Can Provide Care And Receive PSL?

- The PSL definition of an “individual” is broader than the FMLA’s definition of covered family members
- It includes an employee’s immediate family member, a person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined
- An “individual” does not include persons with whom the employee has no personal relationship

PSL 5: What Kind Of Order Of Closure Triggers PSL And What If Others Can Care For Employee's Child?

- The school closure order may be issued by a State or local official or authority or at the decision of the individual school or place of care
- PSL is only available if no other suitable person is available to care for the son or daughter during the leave period
- Employees generally do not need to take leave if another suitable person, co-parent, co-guardian or usual care provider is available to provide the care
- Child care and supervision is a very personal decision, so expect employees may resist employer efforts to enforce this limitation
- IRS FAQ states that for care of a child over 14 during daylight hours, special circumstances must exist requiring an employee to provide care

PSL 6: What Is A Substantially Similar Condition Triggering PSL?

- Employees are technically eligible to take PSL leave if they have “a substantially similar condition” as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor
- Guidance has not yet been issued on this PSL reason
- The temporary regulations state that guidance may be provided at any time from April 1, 2020 to December 31, 2020

IRS FAQ 44: What Documentation Can You Request for Leave and Tax Credit Purposes?

Leave Based On PSL Or PFML For All Reasons

Employee's name

Date or dates for which leave is requested

Statement of the COVID-19 related reason the employee is requesting leave and written support for such reason

Statement that the employee is unable to work, including by means of telework, for such reason.

Plus For Leave based On A Quarantine Order Or Self-Quarantine Advice

Name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine

If the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee

Plus For Leave Based On A School Or Child Care Closing

Name and age of the child

Name of the school that has closed or place of care that is unavailable

Representation that no other person will be providing care for the child during the period for which the employee is receiving leave

If the child is older than fourteen and the leave is during daylight hours, a statement that special circumstances exist requiring the employee to provide care

The Families First Coronavirus Response Act

Prohibited Acts and Penalties

- The PFML requirements amend FMLA, so prohibited acts under FMLA apply
- An employer with less than 50 employees for each working day in at least 20 calendar workweeks in either 2020 or 2019 is not subject to a private civil lawsuit for not providing PFML
- It shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—
 - (1) takes leave in accordance with this Act; and
 - (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding
- The unlawful termination is treated as discriminatory discharge under the FLSA and the failure to provide PSL is treated as failure to pay minimum wages under the FLSA
 - Fines (up to \$10,000)
 - Imprisonment (up to 6 months), and
 - Payment of damages (including liquidated damages, attorney's fees and costs)

Frequently Asked Questions

- Is FFCRA retroactive to cover leaves provided for COVID-19 before 4/1?
- When do we determine the under 500 threshold?
- How do we determine if the company is under the 500 threshold?
- Does the continuous work day rule under the FLSA apply if a non-exempt employee takes PSL or PFML intermittently?
- Does taking PSL or PFML impact an employee's exempt status under FLSA?
- If an employee wants to take leave because the employee is uncomfortable being in the workplace, does PSL apply?

Frequently Asked Questions

- Does PSL or PFML protect an employee from layoffs?
- If the employee can telework, are they eligible for leave?
- If we have less than 50 employees are we automatically exempt?
- If we place employees on layoff or furlough, can employees still receive the leave?
- If an employee takes PSL due to having COVID-19 and can't return to work at the end of the 2 weeks, can the employee take regular FML at that time?

Furloughed Employees and Paid Time Off

- **PTO:**

- Should it be paid?
 - Policy?
 - What are details of the furlough?
- Can employees use PTO on furlough?
- What happens upon return?

- **Sick leave:**

- Can it be forced?
 - When?
 - How much?
- What happens at re-hire or when recalled?

Maryland's Healthy Working Families Act

- **Covered Reasons for Leave:**

- To care for or treat the employee's mental or physical illness, injury or condition;
- To obtain preventative medical care for the employee or the employee's family member;
- To care for a family member with a mental or physical illness, injury or condition;
- For maternity or paternity leave; or
- For an absence due to domestic violence, sexual assault, or stalking committed against the employee or the employee's family member under certain circumstances.

- **How to handle other reasons for leave:**

- Underlying health condition?
- Health condition of a household member?
- Fear of returning to work?

Montgomery County's Earned Sick and Safe Leave Law

- **Additional, Applicable Covered Reasons for Leave:**

- if the employer's place of business has closed by order of a public official due to a public health emergency;
- if the school or child care center for the employee's family member is closed by order of a public official due to a public health emergency;
- to care for a family member if a health official or health care provider has determined that
- the family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease;

- **COVID-19 Guidance issued by Montgomery County:**

https://www.montgomerycountymd.gov/humanrights/Resources/Files/Statement_on_SickandSafeLeave.pdf

Considerations for Temporary Leave Policies

- **Who?**
 - Employers not subject to FFCRA
 - Essential employers
- **Purpose?**
 - Protect the workforce
 - Keep business running, particularly if essential
 - Address issues employees are facing (child care, etc.) not otherwise covered
- **What?**
 - New temporary leave policy
 - Modification to current leave policy
 - Combination
 - Donation policy

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Frequently check cdc.gov and/or coronavirus.gov

Frequently check your state COVID-19 webpage

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Thank **you.**