

## Tax, Labor and Employment, Employee Benefits and Environmental Financial Relief in Response to COVID-19, So Far... Episode I.

By: [Gail H. Morse](#), [Sarah E. Haddy](#), [Joseph J. Torres](#), [Emma J. Sullivan](#), [Jenna A. Bressel](#), [Geoffrey M. Davis](#), [Matthew J. Renaud](#) and [Gabrielle Sigel](#)



Jenner & Block is monitoring the guidance being adopted and/or issued from Congress, the United States Treasury, Internal Revenue Service and State and Local Tax Agencies for responses to the COVID-19 emergency. As part of a series of updates, this alert summarizes the **Families First Coronavirus Response Act** enacted in the late hours of March 18, 2020 and also covers certain other tax guidance related to the COVID-19 crisis.

### I. Families First Act

The **Families First Coronavirus Response Act** (Families First Act or the Act) ([H.R. 6201](#), Pub. Law 116- ) was signed by the President quickly after it passed the Senate on March 18. This is the second bill passed by Congress in response to the COVID-19 outbreak, coming on the heels of the **Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020**, [Pub. Law 116-123](#), that provided for \$8.3 billion in emergency funding for federal agencies to directly, and through state agencies, respond to the outbreak. Though the ink is barely dry on the Families First Act, a third measure is already being discussed by legislators and the President and more can be expected to follow.

**The Families First Act**, among other things, provides employees access to: (i) 12-weeks of job-protected leave under an emergency expansion of the Family and Medical Leave Act (FMLA) and (ii) 2-weeks of paid sick leave pursuant to adoption of new paid sick leave requirements. The provisions related to expanded FMLA leave and paid sick leave apply only to (a) **private employers with fewer than 500 employees**, and (b) **covered public employers**. Employers are given certain payroll tax credits to offset the cost of the FMLA and sick leave expansion. The Families First Act provides the following relief:

#### A. *Emergency Family Medical Leave, an Expansion of FMLA*

The Emergency Family Medical Leave Expansion Act (Emergency FMLEA) temporarily amends the FMLA to provide a public health emergency leave related to the COVID-19 crisis. The Emergency FMLEA provides up to 12 weeks of job-protected leave related to caring for a child.

Unlike FMLA, which is only available to employees who have worked at a company for at least 12 months, the Emergency FMLEA applies to eligible employees who have worked at a company for at least 30 calendar days. However, employers are not required to offer Emergency FMLEA coverage to employees that are health care providers and emergency responders.

If eligible, an employee qualifies for Emergency FMLEA coverage if they are unable to work (or telework) because they took leave to care for a child under 18 years of age, if the child's school or daycare closed, or the childcare provider is unavailable due to the public health emergency. The first 10 days of this leave *may be unpaid*, but employees can use other paid time off during this 10-day window. After the first 10 days of leave, employers *must* pay at least two-thirds of an employee's regular rate of pay, up to a maximum of \$200/day (\$10,000 maximum benefit). Special rules apply to calculate the average hours of a variable hour employee.

In general, FMLA requires employers to restore employees to their positions after they return from leave. However, the Emergency FMLEA does not require employers with fewer than 25 employees to follow the job restoration requirement if all the following conditions are met: (i) the employee takes a public health emergency leave; (ii) when the leave ends, the employee's previous position no longer exists due to economic conditions that affect employment and are caused by a public health emergency; and (iii) the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits and pay. If the employer is unable to restore the employee to an equivalent position when the leave ends, the employer would need to notify the employee if an equivalent position opens up within 1 year. The 1-year period begins on the earlier of (a) the date the qualifying need related to a public health emergency ends, or (b) 12 weeks after the date on which the employee's public health leave begins.

Given that the Emergency FMLEA creates a new category of leave along with the existing categories of FMLA leave, the total period of time available for FMLA leave still applies (i.e., 12 weeks over a 12-month period). The Emergency FMLEA takes effect no later than April 2, 2020 (15 days after the enactment of the Act), and expires at the end of 2020.

### *B. Paid Sick Leave*

The Emergency Paid Sick Leave Act requires employers to provide up to 80 hours of paid sick leave to full-time employees for COVID-19 purposes. Part-time employees are eligible for prorated paid sick leave. The Emergency Paid Sick Leave Act applies to all employees, regardless of how long they have been employed, but employers may opt to exclude employees that are health care providers and emergency responders from eligibility.

Under this Act, employees are eligible for sick pay if they are unable to work (or telework) in any of the following situations:

1. The employee must comply with a public quarantine or isolation order;
2. The employee is advised to self-quarantine based on the advice of a healthcare provider;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to quarantine or isolation under i. or ii. above;
5. The employee is caring for a child, if the child's school or daycare closed, or the childcare provider is unavailable due to COVID-19; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

The rate at which the sick pay is calculated is based on the employee's regular rate of pay or, if higher, the applicable minimum wage rate. For situations described in i., ii. or iii. above, employees receive 100% of their regular rate of pay or, if higher, the applicable minimum wage rate, up to \$511/day. Employees receive *two-thirds* of their regular rate of pay or, if higher, the applicable minimum wage rate, up to \$200/day for situations described in iv., v., or vi. above.

Employers cannot require employees to first use other paid time off. Employers must post a notice that describes the requirements of the Emergency Paid Sick Leave Act. A model notice will be provided by the Secretary of Labor.

The Emergency Paid Sick Leave Act takes effect no later than April 2, 2020 (15 days after the enactment of the Act), and expires at the end of 2020.

### *C. Small Business Exemption*

Small companies (less than 50 employees) may apply for waivers from both the Emergency FMLEA and the Emergency Paid Sick Leave Act if imposing such requirements would threaten the viability

of the business.

#### *D. Group Health Plan Provisions*

In addition to the expansion of FMLA and paid sick leave, the Families First Act also has an impact on group health plans, regardless of the size of the employer. The Act requires a group health plan, including grandfathered health plans, to provide coverage without any cost sharing for COVID-19 diagnostic testing, including provider, urgent care and emergency room visit costs. The Act also prohibits any requirements that an individual obtain prior authorization or satisfy other medical management requirements. However, the coverage mandate applies only to diagnostic testing, not the cost of care for persons who have been diagnosed with COVID-19.

Prior to the Act's passage, the IRS issued Notice 2020-15. As discussed below, Notice 2020-15 provides that medical care services and items purchased relating to testing for, and treatment of, COVID-19 may be covered without cost sharing by a high deductible health plan (HDHP), regardless of whether the plan's deductible has been met.

The group health plan provisions are effective as of **March 18, 2020**, and continue until the Secretary of HHS determines that the public health emergency has ended.

#### *E. Additional Provisions*

In Division F, Section 6005, the law provides that manufacturers, distributors and others of general-use (a/k/a industrial use) personal respiratory protective devices approved by NIOSH (42 CFR part 84) and designated by the FDA, are a "covered countermeasure" and, therefore, subject to broad liability immunities under the Public Readiness and Emergency Preparedness Act of 2005, 42 U.S.C. § 247d-6d. The FDA designated industrial respirators which are subject to liability protection in official designations issued on March 2 and 11, 2020. Industrial respirators will remain a liability-immune countermeasure if they are used to address COVID-19 anytime between January 27, 2020 and October 1, 2024, in response to the public health emergency declared by the Secretary of Health and Human Services, Alex M. Azar II, on January 31, 2020.

The Families First Act also provides for additional emergency relief, including:

- Expanded food assistance for school meals, food banks and meals to seniors; increased funding for the Supplemental Nutrition Assistance Program; increased funding for the women, infants and children nutrition program; and increased food grants to US territories.
- Expanded unemployment aid to state unemployment insurance funds.
- Increased Medicaid funding.

#### *F. Employment Tax Credits and Exclusions*

To assist employers and eligible self-employed individuals in funding the Emergency Paid Sick Leave Act and Emergency FMLEA benefits, certain amounts paid as wages under each provision are available as refundable payroll tax credits while also providing that the amounts paid under the Emergency Paid Sick Leave Act and the Emergency FMLEA are not subject to the employer's portion of the social security tax under section 3111(a) of the Internal Revenue Code (IRC).

#### **Expanded Paid Family Leave Credit:**

*Employers* are eligible for a refundable credit against the employer's portion of the social security tax (IRC section 3111(a)) for amounts paid by an employer each quarter under the Emergency FMLEA. The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters.

The credit is refundable if the credit exceeds the employer's total liability for the social security portion of its payroll taxes. Employers can elect not to take the credit, and no deduction is allowed

for the amount of the credit. Finally, the credit is not available to any employer receiving a credit for FMLA benefits under section 45S of the IRC (a provision that sunset in 2019 and has not yet been extended).

*Eligible self-employed individuals* (individuals who would be entitled to receive paid leave pursuant to the Emergency FMLEA if the individual was an employee of an employer other than itself) receive a credit against their income tax for 100% of the qualified family leave equivalent amount. The qualified family leave equivalent amount is capped at the number of days the benefit is paid (up to 50) multiplied by the lesser of \$200 per day or 67% of the average daily self-employment income for the taxable year (net earnings from self-employment divided by 260). Only days that the individual is unable to work for reasons that would entitle the individual to receive paid leave pursuant to the Emergency FMLEA can be taken into account. The credit applies to self-employed individuals in US Territories.

### **Paid Sick Leave Credit:**

*Employers* receive a refundable credit against the social security tax (imposed under section 3111(a) of the IRC) for the sick leave wages paid each quarter under the Emergency Paid Sick Leave Act. The credit is limited to \$511 per day for employees who are required to: 1) comply with a public quarantine or isolation order; 2) self-quarantine based on the advice of a healthcare provider; or 3) obtain medical care for COVID-19 symptoms. The credit is limited to \$200 per day for employees who are: 1) caring for an individual who is under quarantine or isolation; 2) caring for a child, if the child's school or daycare closed or the childcare provider is unavailable due to COVID-19; or 3) in any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor. The credit is further limited to an aggregate of 10 days of paid benefits.

The credit is refundable if the credit exceeds the employer's total liability for the social security portion of its payroll taxes. Employers can elect not to take the credit, and no deduction is allowed for the amount of the credit. Finally, the credit is not available to any employer receiving a credit for FMLA benefits under section 45S of the IRC (a provision that sunset in 2019 and has not yet been extended).

*Eligible self-employed individuals* also receive a refundable credit against their income tax liability. An "eligible self-employed individual" is someone who would be entitled to receive paid leave under the Emergency Paid Sick Leave Act if the individual was an employee of an employer other than itself and includes self-employed individuals in US Territories.

Eligible self-employed individuals who are required to: 1) comply with a public quarantine or isolation order; 2) self-quarantine based on the advice of a healthcare provider; or 3) obtain medical care for COVID-19 symptoms are allowed a credit for the qualified sick leave equivalent amount for an aggregate of 10 days. The qualified sick leave equivalent amount is equal to the lesser of \$511 per day or 100% of their average daily self-employment income for the taxable year (net earnings from self-employment divided by 260).

Eligible self-employed individuals who are: 1) caring for an individual who is under quarantine or isolation; 2) caring for a child, if the child's school or daycare closed or the childcare provider is unavailable due to COVID-19 or 3) in any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor are entitled to a credit for the qualified sick leave equivalent amount paid for 10 days in the aggregate. The qualified sick leave equivalent amount is equal to the lesser of \$200 per day or 67% of the average daily self-employment income for the taxable year (net earnings from self-employment divided by 260).

To prevent any doubling of the benefit, the qualified sick leave equivalent amount is proportionately reduced for any days that the individual also receives qualified sick leave wages from an employer.

Self-employed individuals must maintain records to show they are entitled to the credit.

Wages paid as required paid sick leave are not considered wages for section 3111(a) and are not be subject to the social security portion of the payroll tax.

### **Secretary of the Treasury Guidance on Credits:**

Under both credit regimes, the Secretary of the Treasury is given broad authority to issue regulations and guidance. Moreover, payments generating the credits under either credit provision are those made for days occurring during the period beginning on a date selected by the Secretary of the Treasury during the 15-day period beginning on the enactment date of the Act (March 18, 2020) and ending on December 31, 2020.

The credits discussed above are also increased by the tax imposed by the Hospital Tax imposed on employers under IRC section 3111(b).

The social security trust fund is to be held harmless from either credit by the transfer of funds from the general fund to cover the taxes not paid as a result of the credits.

## **II. Treasury Extends Income Tax Payment and Tax Filing Deadlines 90 Days.**

In a press conference on March 17, 2020, Treasury Secretary Steven Mnuchin announced that individuals and businesses will be given a 90-day extension for making tax payments otherwise due on April 15, 2020. Individuals are able to defer up to \$1 million in payments and Corporations up to \$10 million. Returns still have to be filed.

The IRS formalized the Secretary's press-conference guidance in Notice 2020-17 issued March 18, 2020. The payment extension applies only to federal income tax payments due April 15, 2020 for tax year 2019 or an estimated payment for the 2020 tax year. Every person with a federal income tax payment due April 15, 2020 is determined to be affected by COVID-19 and thus able to take advantage of the postponement.

Payments due on April 15, 2020 are now due on July 15, 2020. Consolidated groups and C corporations not part of a consolidated group can postpone up to \$10 million, all other taxpayers can postpone up to \$1 million—including single taxpayers or married taxpayers filing joint returns.

**NO EXTENSION IS PROVIDED IN NOTICE 2020-17 FOR THE PAYMENT OR DEPOSIT OF ANY OTHER TYPE OF FEDERAL TAX OR FOR THE FILING OF ANY TAX OR INFORMATION RETURN.**

By tweet on March 20, 2020, the Secretary of the Treasury also announced that "Tax Day" would also be extended to July 15, 2020 so that "[a]ll taxpayers and businesses will have this additional time to file and make payments without interest or penalties." At this writing, no other official announcement has been issued. Given the limitation of Notice 2020-17 to income tax payments, the Secretary's filing extension is presumably limited as well to the filing of income tax returns.

## **III. Internal Revenue Service—Relief for High Deductible Health Plans**

In Notice 2020-15 (March 11, 2020), the IRS issued new guidance clarifying that the provision of benefits related to COVID-19 will not violate the deductible rules for HDHPs. In particular, the guidance provides that a program will not fail to be an HDHP under the provisions of Section 223(c)(2)(A) of the Code (requiring minimum deductibles) merely because the health plan provides benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible (self-only or family) for an HDHP.

## **IV. State and Local Tax Filing Guidance**

Each taxing jurisdiction to which returns are due will have their own guidance on filing and tax payment due dates, postponements, etc. Jenner & Block is monitoring this guidance daily and is available to work through the nuances of the issued guidance. Look for additional guidance on state and local tax

payment and filing extensions.

The following professionals are available to discuss these fast emerging and changing actions:

## Tax

[Gail H. Morse](#), [Geoffrey M. Davis](#), [Christian E. Kimball](#)

## Employee Benefits

[Sarah E. Haddy](#), [Jenna A. Bressel](#), [Matthew J. Renaud](#), [Raymond D. Sinnappan](#)

## Labor and Employment

[Joseph J. Torres](#), [Emma J. Sullivan](#)

## Environmental and Workplace Health & Safety

[Gabrielle Sigel](#)

---

*Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.*

*For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.*

[Click here to visit our COVID-19 / Coronavirus Resource Center](#)



---

## Contact Us



**Gail H. Morse**

[gmorse@jenner.com](mailto:gmorse@jenner.com) | [Download V-Card](#)



**Sarah E. Haddy**

[shaddy@jenner.com](mailto:shaddy@jenner.com) | [Download V-Card](#)



**Joseph J. Torres**

[jtorres@jenner.com](mailto:jtorres@jenner.com) | [Download V-Card](#)



**Emma J. Sullivan**

[esullivan@jenner.com](mailto:esullivan@jenner.com) | [Download V-Card](#)



**Jenna A. Bressel**

[jbressel@jenner.com](mailto:jbressel@jenner.com) | [Download V-Card](#)



**Geoffrey M. Davis**

[gdavis@jenner.com](mailto:gdavis@jenner.com) | [Download V-Card](#)



**Matthew J. Renaud**

[mrenaud@jenner.com](mailto:mrenaud@jenner.com) | [Download V-Card](#)



**Gabrielle Sigel**

[gsigel@jenner.com](mailto:gsigel@jenner.com) | [Download V-Card](#)