

The background features a dark blue gradient with a subtle pattern of white dots. Overlaid on this are several circular elements: a large scale on the left with numerical markings from 140 to 260, and several smaller circles with dashed lines and arrows, suggesting a technical or scientific theme.

# COVID-19

## EMPLOYER UPDATE

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# FFCRA – DOL UPDATES

- **\*\*NEW START DATE: April 1, 2020\*\***
- 500 employee threshold is counted when the leave is being taken.
- Employee count is the same under the FMLA (full-time, part-time, seasonal, temporary).
- Under 50 employees – prepare to show why it would jeopardize your business – don't send anything to the DOL.

# FFCRA – DOL UPDATES

- Calculating Hours – Average hours scheduled to work, if you cannot determine that way, then count the average hours for the last 6 months, or as of start date if shorter.
  - Overtime is included, but not really – they state that in the averaging of hours overtime needs to be included, however, it is capped at 80 hours for two weeks and you do not pay out premium pay for the leave.
- Regular Rate of Pay – Average pay over the last six months, or your start date if shorter.
- Only can take this leave once, cannot take it for another reason.
- Last 30 Calendar Days – Hired within the last thirty days as of the day you request leave.

# FFCRA – DOL UPDATES

- Furloughed Employees – Will NOT be covered by these leaves. DOL just recently updated this today. This is a stark contrast from what has been suggested. If employees are furloughed or the company is shut down, employees will NOT be entitled to paid leave.
- Intermittent Leave – Only allowed if the employer and employee agree, up to the employer's discretion. This can only be used with telework, meaning an employee can't use intermittent leave and still come into work physically.
  - Example: Employee can work from home 30 hours per week but needs to care for her child 10 hours per week. She would telework for 30 hours and 10 hours would be paid at 2/3 rate.
- Here's a link to the DOL's Q&A: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.
- New Poster: [https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA_Poster_WH1422_Non-Federal.pdf) (beware, there's an error)

# FFCRA – IRS UPDATES

- Employers will receive 100% of the reimbursement for Paid Leave under FFCRA:
  - Includes health insurance costs
  - No payroll tax liability for leave time paid out
- Quick to Obtain:
  - Immediate dollar for dollar tax offset will be applied.
  - If any reimbursement is needed it will be expedited.
- 30-day Grace Period:
  - If an employer believes that they are exempted or do not need to comply with either of the leaves, then they will have a 30 day grace period to determine if they need to comply with the law. This must be done in good faith.

# FFCRA – IRS UPDATES

- Retaining Payroll Taxes:
  - Employers who payout EPSL or EMFLA, will be allowed to retain taxes for federal income taxes, employee share of social security, and employee share Medicare.
  - If there is not enough payroll tax to cover the cost of the paid leave, then business can be expedited reimbursement
  - More guidance to follow next week.
  - Examples:
    - If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.
    - If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

# SHELTER IN PLACE/STAY AT HOME

- This will likely qualify for the Emergency Paid Sick Leave under the state, federal, or local government issuing a quarantine or isolation due to COVID-19. This would be paid to non-essential employees.
- If employees can telework, then they are not entitled to either leaves under the FFCRA. They may be entitled to intermittent leave if they cannot work their full schedule.

# ESSENTIAL V. NON-ESSENTIAL

- Incredibly state specific, if you do have a question, reach out to us directly. There is likely not a blanket answer.
- Generally what has been considered essential: food chain (grocery stores, deliveries), health care providers (centers, hospitals, urgent care), Energy (electricity, gas), transportation (gas stations, auto repairs), and necessary supply chains (manufacturing for health care industry, automobiles, etc.)
- Marina Trade: fuel, repairs, selling parts, any service or stream of commerce to emergency equipment would be considered essential. Any retail for leisure or pleasure would not be essential.
- You will likely need to close down the parts of your business that are considered non-essential.
- Unless the employee qualifies for leave under the new FFCRA, they are still required to come to work if they are considered essential.



# REDUCTION IN FORCE

- **Furloughs:** This is only temporary, the employment relationship is still continued
  - If the employee is on long term or short term disability, these would likely still continue while out on furlough.
    - This depends on if you are self-funded or with an insurance policy. Likely insurance would have a provision for furloughs and lay offs.
  - If the employee is out on FMLA or other state leave, it would pause while out on furlough and resume upon return. Employers cannot force FMLA leave, therefore furloughed time does not count towards FMLA.
    - For example: Employee has been out for 10 weeks on FMLA, they are furloughed for 2 months. Upon return, they are still entitled to 2 more weeks of FMLA leave.
- **Layoffs:** This is permanent, the employee relationship has terminated
  - Depending on the state's PTO pay out laws, you will want to weigh the cost of paying out accrued PTO with the cost of providing Emergency Paid Sick Leave and Emergency Family and Medical Leave. It may be more cost effective to lay off.

# REDUCTION IN FORCE: BENEFITS

- Reduction in Hours and Furloughs:
  - Need to look at the specific underlying documents for your health care plan.
  - Continuing benefits is determined by what the measurement period is in your plan to determine eligibility.
  - The measurement period then informs the “stability period” meaning the amount of time you are required to provide benefits regardless of the amount of hours worked.
  - Once that stability period is over you then measure again and determine if benefits need to be offered through the new stability period.
  - Look back method by year – complicated, Look back method by month – easier, can terminate benefits in any month they do not meet the requirement and provide COBRA.
- Lay offs:
  - Benefits terminate, eligible for COBRA.

# NEW STIMULUS PACKAGE

- Moving target: today went from 1,000 pages to 800 pages overnight last night – keep posted for new client alert.
- Here's what we know:
  - \$500 Billion Loan Program for Large Businesses: Likely to be for employers over 500 and using the same determination as the FFCRA.
  - Unemployment Insurance: Federal government will provide \$600 in addition to the state's base rate calculation, every week, up to four months. This is extended to gig economy and freelance workers.
  - Small Business Loans: \$367 billion to small businesses. Up to \$10 million with the specific purpose of covering payroll through the duration of the crisis. If they continue to pay workers through this crisis, then they will receive a forgiveness on the loan.

# FAQS

- If an employee is furloughed prior to April 2 are we still mandated to provide the emergency sick leave and/or emergency FMLA?
  - The date to implement the leave is April 1<sup>st</sup>, now with the new DOL guidance. No, the DOL provided an updated guidance stating that if the employer is closed or temporarily furloughed employees, they would not be entitled to the leave.
- With the new stimulus package congress is voting on today (Wed 3/25) will an employee get more unemployment compensation if on lay off versus furlough (or doesn't it matter).
  - The voting was postponed, however, it will not matter, either way furlough or lay off they will be entitled to unemployment and the additional payment in the stimulus package.

# Q&A

The background is a dark blue gradient with a field of small white stars. Overlaid on this are several technical diagrams in a lighter blue color. In the top right, there is a large circular gauge with concentric rings and numerical markings from 0 to 210. In the bottom right, there is a diagram with concentric circles and arrows indicating a clockwise direction. In the bottom left, there is a diagram with concentric circles and arrows indicating a counter-clockwise direction. In the top left, there is a small circular diagram with a curved arrow.