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# General Counsel Employment Law Report

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# Introduction

The contents of this Report provide chronological updates on the Stimulus Bills, U. S. DOL guidance on the Families First Coronavirus Response Act, an overview of the CARES Act, guidance from the Centers for Disease Control, a heads-up on OSHA COVID-19-related claims and the services we offer to help our clients.

# Real Time Updates: Stimulus Bill, DOL Guidance

Change is the only constant has never been truer. The Department of Labor (DOL) has just released important guidance on the FFCRA (below). The Stimulus Bill is still being drafted but there are areas that have been agreed upon by all parties. As the text of the bill has not been released yet we would urge you to wait a few days before formulating a company wide response to the current economic conditions. We are updating our [FFCRA Compliance Package](#) in real time so that you can easily incorporate changes to your workplace. [Check it out.](#)

Here is what we believe the **Stimulus bill** will include so far:

- **\$500 billion loan program for large businesses:** Emergency loans for both large businesses and municipalities. There will be an inspector general who will oversee these funds and a congressional oversight panel to examine how the money will be used. Businesses controlled by the President, members of Congress, Executive Department heads, and their families will not qualify.
- **Unemployment Insurance:** The new bill will increase unemployment insurance by \$600 per week for 4 months. The money is in addition to what states pay as a base unemployment salary. This benefit will also extend to gig economy workers, freelancers, and furloughed workers.
- **Healthcare Funds and Protections:** The latest bill will contain \$150 billion for hospitals treating coronavirus patients, \$100 billion will go to hospitals, \$1 billion to Indian Health Service, and the remainder to increase medical equipment capacity.
- **Aid to State and Local Governments:** \$150 billion would be allocated for governments who are dealing with the impacts of the crisis.
- **Direct Payments to Adults below a Certain Income Threshold:** One time checks of \$1,200 to adults making \$75,000 or less, according to past tax returns. A \$500 payment for each child in a household.
- **Loans to small businesses:** \$367 billion in the bill aimed at providing loans for small businesses. The bill would ensure the Small Business Administration could serve as a guarantor for loans of up to \$10 billion for small businesses to ensure they can maintain their payrolls and pay off their debts. Other news reported there would be \$350 billion that would establish lending programs for small businesses, but only for those who keep their payrolls steady through the crisis. Small businesses that pledge to keep their workers would also receive cash-flow assistance structured as federally guaranteed loans. If the employer continued to pay its workers for the duration of the crisis, those loans would be forgiven.
- **Limits on Stock Buybacks:** legislation included a ban on stock buybacks for any company receiving a government loan from the stimulus package. The ban lasts the term of the government assistance plus 1 year.
- **Other funding:** \$30 billion in emergency education funding, \$25 billion in emergency transit funding and creates an employee retention tax credit to incentivize businesses to keep workers on payroll during the crisis.

## Department of Labor Guidance on FFCRA

Here are key changes and guidance from the DOL from an [FAQ](#) just issued:

- The effective date of the FFCRA paid leave provisions are April 1, 2020 not April 2
- Guidance on calculating the 500 employee threshold have been provided, including joint employers and part time workers
- Overtime must be included in pay calculations
- Paid sick leave (PSL) cap is 80 hours
- PSL and FMLA run concurrently and are not retroactive.

We can help. Please do not hesitate to reach out.

# CARES Act Unpacked; More FFCRA Leave Guidance

Like many others, I went to law school to avoid math. Lately, I have learned what exponential means, sadly. It means urgency and anxiety and fear now. But there is hope too and the new stimulus bill could help. We can also help and stand ready to assist clients in all aspects of compliance and assistance under the [COVID-19 response acts](#), including the CARES Act and the [FFCRA](#).

Foley & Foley PC is grateful always for our clients and the privilege to assist them. A summary of the CARES Act is below and at the end is further FFCRA guidance from the DOL that deserves a quick look too.

## CARES Act:

### Paycheck Protection Program – Small Business Loans:

- **WHO:** Businesses with 500 employees or fewer that continue to employ and pay workers through the coronavirus crisis, will be eligible to apply for these SBA loans. This program is directed under Section 7(a) of the Small Business Act. Note that if an employer has more than one physical location where each location has 500 or fewer employees, they are also eligible.
- **WHAT:** The SBA will be able to administer forgivable loans up to \$10 million per company, in order to provide assistance to employers who maintain their payroll through this crisis. This means employers will need to keep their workers employed. Applicants will need to verify the previous 6 weeks of payroll and later verify they have paid employees for 8 weeks after receiving the loan.
  - The amount to be guaranteed under the loan is the amount equal to the average total monthly payroll costs in the 1 year prior to the loan application. Payroll costs include all payments for compensation, tips, severance, PTO, healthcare costs, and taxes.
  - Employers will be able to use loans for the following purposes: Payroll, PTO, leaves (except for FFCRA), group health plan costs, salaries, mortgage payments, rent payments, utilities, and debt. It cannot be used for individual employee compensation that exceeds \$100,000, compensation of an employee whose principal place of residence is outside the US, or for FFCRA leave payments.
  - The loans will have an interest rate not to exceed 4%, and during the loan period, there will be no fee collection.
- **HOW:** Employers will need to maintain their payroll from February 15, 2020 through June 30, 2020, in order to have the loan forgiven. A Senator indicated that in the case of small businesses who have already furloughed or laid off individuals, it is possible for these businesses to still qualify for the loans if they rehire and begin paying those individuals through this loan.
- **WHEN:** The bill requires that SBA enact these programs with regulations no later than 15 days after the Act is signed into law.

- Treasury has stated the streamlined process could take as little as one day to obtain the funds.

### **Economic Injury Disaster Loans – Small Business Loans:**

This is a separate Emergency Grant program, which will provide immediate relief to small businesses through the SBA Economic Injury Disaster Loan program.

- **WHO:** Employers who have 500 or fewer employees and private nonprofits are eligible for these loans.
- **WHAT:** Businesses will be able to obtain an advance loan of up to \$10,000 under this program. The SBA is likely to have a quick turn around period of only 3 days. The new bill has given an additional \$10 billion to this program.
  - During this crisis, the SBA has waived the requirements of personal guarantees, the requirement that a business exist for at least one year, and requirement that an applicant be unable to find a loan elsewhere.
  - The interest rate is 3.75% for small businesses and 2.75% for nonprofits.
  - The loans can be used to pay debts, payroll, accounts payable, employee sick leave, and utilities. It cannot be used to refinance debts, make payments on other loans from the government, pay tax penalties or fines, repair damage, or pay dividends.
- **WHEN:** Same timeline as above.

### **Unemployment Expansion:**

- **WHO:** *Self-employed individuals, independent contractors, part-time workers who are not always covered under normal circumstances* will be able to obtain unemployment for reasons related to COVID-19.
- **WHAT:** The CARES Act will expand the Unemployment program throughout the country through December 31, 2020.
  - Workers may now be eligible for unemployment for the following reasons, if they are:
    1. diagnosed with COVID-19;
    2. experiencing symptoms of COVID-19 and seeking a COVID-19 diagnosis or testing;
    3. a member of the individual's household has been diagnosed with COVID-19;
    4. caring for a family member or household member who has been diagnosed with COVID-19;
    5. caring for a child or other household member whose facility has been shut down due to the coronavirus pandemic;
    6. unable to reach the place of work due to quarantine imposed as a direct result of the COVID-19 public health emergency;
    7. unable to reach the place of employment because a health care provider has advised self-quarantine due to concerns related to COVID-19;
    8. scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
    9. now the breadwinner or major support for a household because the head of the household died as a direct result of COVID-19;
    10. quitting a job as a direct result of COVID-19; or
    11. closure of place of business as a direct result of COVID-19.

- **MORE WHAT:** Individuals who qualify for unemployment under these purposes may be eligible for retroactive benefits from January 27 through the enactment of the CARES Act.
  - Unemployment benefits are not available for individuals who are able to telework for pay or individuals receiving paid sick leave or other paid leave benefits.
  - On top of the regular state unemployment benefits determined by each state, this bill would provide an additional \$600 per week for up to 4 months, so that individuals may be able to obtain benefits closer to their normal income.
  - The unemployment benefits will also extend the eligibility for benefits by 13 weeks, not to exceed a total of 39 weeks.

### **FFCRA GUIDANCE FROM THE DOL:**

#### Our takeaways:

- Where individuals who are furloughed or unable to work for the employer because of business closure/no work available, those employees are not eligible for the FFCRA leave.
- An employee can take intermittent expanded FMLA or paid sick leave— but only with an employer's permission.

# March: In Like a Lion, Out Like a Really Angry Lion

March has been one heck of a year month. Even Congress has been working hard, with a rumor of another stimulus bill coming out in April. The behemoth that is the **Families First Coronavirus Response Act (FFCRA)** has left the Department of Labor (DOL) scrambling to keep up with questions. The DOL has released [more guidance](#) which is highlighted below:

- **Full time/part time** has been clarified for Paid Emergency Sick Leave and is based on a 40 hour week as full-time. The Emergency Family and Medical Leave provision does not distinguish between full and part time although hours paid are based on hours worked.
- **The definition of health care provider** for exclusions from Paid Sick Leave and Family and Medical Leave have been broadly defined. By contrast, the definition of health care provider who can determine a self quarantine is much more narrow.
- **Small business exemption:** In select circumstances, where the viability of a business as a going concern is at stake, some employers with less than 50 employees may be exempted from the emergency paid sick leave and family and medical leave if:
  - Use of the leaves would result in expenses and financial obligations exceeding revenue and cause the business to cease operating at a minimal level;
  - 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
  - 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.

If you need assistance requesting a small business exemption, please reach out. We also update our [FFCRA Compliance Package](#) in real time to incorporate new guidelines and rules via email to keep your workplace up to date.

We are all grateful for our good health and are ready to help.

# Really Useful Information. No Fooling.

On April 1 and the FFCRA took effect. Get your poster up or emailed to remote workers and have your policies ready to comply with this law. And yes, we have our [FFCRA Compliance Package](#) at the ready—which is evergreen so you get email updates as they unfold.

Speaking of updates, the IRS has provided guidance on how to document leave requests to get those tax credits. [See questions 44-46](#) for the details.

And what about all that free money from the CARES Act? The SBA lenders are telling us applications for the Paycheck Protection Program will begin April 3, 2020. Here is a [sample application](#). You can find the [Emergency Disaster Loan Assistance application](#) here, which is essentially a \$10,000 grant for qualifying entities.

Find some joy today! Here is a [fun video](#) for home schoolers or anyone who wants a laugh.

# Everything Is Going To Be Alright (And There's Still Time to Get Your FFCRA House in Order)

Have you been too busy keeping your business afloat to deal with the obligations of the Families First Coronavirus Response Act (FFCRA)? It is not too late. There is a [grace period](#) of 30 days from when the law was signed. You have until April 17, 2020, to comply with the law provided you acted in good faith. How will "good faith" be determined? If you remedy the non-compliance as soon as possible and did not willfully disregard the law. After April 17, 2020, enforcement is full on with no exceptions. A quick and painless way to comply is with our [FFCRA Compliance Package](#)—everything in one place (poster, policies, notice, etc.) and updated in real time.

April is National Poetry Month and boy do we need it. Below is a beauty from an Irish poet unfamiliar to me until now. Enjoy.

## **Everything is Going to be All Right**

How should I not be glad to contemplate  
the clouds clearing beyond the dormer window  
and a high tide reflected on the ceiling?  
There will be dying, there will be dying,  
but there is no need to go into that.  
The poems flow from the hand unbidden  
and the hidden source is the watchful heart.  
The sun rises in spite of everything  
and the far cities are beautiful and bright.  
I lie here in a riot of sunlight  
watching the day break and the clouds flying.  
Everything is going to be all right.

**Derek Mahon**, from *Selected Poems*

# Yes, More FFCRA Guidelines and the CDC Too

**UPDATES:** In response to newly published DOL and IRS guidance, [we updated our overview](#) of what employers need to know about the Families First Coronavirus Response Act. We also **updated our FFCRA Monitoring and Use Chart**. Our clients from coast to coast have found the contents of both our [COVID-19 Infectious Disease Toolkit](#) and our [FFCRA Compliance Package](#) to be very helpful. The contents, for which you receive updates, can be purchased for a fixed fee—[mike@foleylawpractice.com](mailto:mike@foleylawpractice.com)

**NEW FAQs:** The DOL has continued to issue FFCRA Guidance in the last few days, in wake of the issuance of clarifying regulations. Here are some of the important clarifications for employers when considering employee eligibility for FFCRA leave:

- **What Qualifies for Government Mandated Quarantine?** The Regulations make it clear that an employee can take quarantine related paid sick leave when they are subject to a Shelter in Place or Stay at Home Order. The DOL has noted that an employee may only take this leave because of a shelter in place or stay at home order if the order causes the employee to be unable to work even though the employer has work the employee could perform but for the order. Employees cannot take paid sick leave for this reason if the employer does not have work for the employee as a result of a shelter-in-place or stay at home order.
- **An employee can only take leave for their own illness if they are seeking medical diagnosis of their symptoms.** Once the employee has obtained a medical diagnosis, the employee can only continue Paid Sick Leave if the employee has been ordered to self-quarantine by the healthcare provider or a government entity. An employee cannot take paid sick leave if the employee unilaterally decides to self-quarantine for an illness without medical advice.
- **An employee needs to genuinely care for an individual who is quarantined in order to qualify for paid sick leave for that reason.** Employees can take this leave for the following individuals: An immediate family member; A household member; A roommate; or Similar person with whom the Employee has a relationship that creates an expectation that the employee would care for the person.
- **Intermittent Leave:** Employers never have to offer intermittent leave for FFCRA, but if they do allow employees to use it, here are some restrictions:
  - Employees can only take intermittent leave for childcare needs if the employee would otherwise need to report in to a worksite. This is because out of all of the FFCRA leaves, this particular leave is the least likely to spread COVID-19.
  - If the employee is teleworking and would not report in physically to work, employers have the discretion to allow employees to take any of the leaves intermittently.
- **Limitations on Employee Eligibility:** Employees are only eligible for FFCRA leave when the worksites, including remote worksite, is open, and the employer has work for the employee. This means that if the Company has a shut down or is forced to close because of a non-essential business order, the employees are not eligible for FFCRA leave for the duration of that

closure. If an employee is on a voluntary leave of absence – such as one related to self-quarantining because they are at high-risk of COVID-19 – the employee can end that leave of absence and take FFCRA leave instead for a qualifying reason. An employee is not eligible for FFCRA leave if the employee is on a mandated leave of absence, such as a company shutdown.

**CDC UPDATE:** The Centers for Disease Control (CDC) has published [new guidance](#) for cleaning and disinfecting your workplace in the event a COVID-19 illness is detected.

**Our goal, always, is to offer solutions to keep your business moving. We can help.**

# It's Always Something

Time— and employment law updates— march on, even during a pandemic. Here is a quick run down of some recent developments:

- New York joins **12 states and the District of Columbia** with a Paid Sick Leave law. Building off the COVID-19 paid sick leave, most New York state employees will have guaranteed sick leave. The measure was adopted as part of the 2021 fiscal year budget and takes effect January 2021.
- The Department of Labor has issued a news release today to remind employers of **whistle blower rights** and the perils of retaliating against employees who report unsafe conditions related to COVID 19 in the workplace. Should you hear from OSHA on this, **we have experience** defending whistle blower claims—please contact us.
- Remember the rocky roll out of the Massachusetts Paid Family and Medical Leave? Yesterday, changes to filing for an exemption for employers with private insurance meeting the law's mandate were **updated**. Insurance policies must be submitted on or before June 3, 2020 to the Division of Insurance (DOI).
- A gentle nudge, **you have until April 17, 2020**, to comply with FFCRA and our FFCRA Compliance Package is a painless way to do so.

# OSHA Ramps Up for COVID19 Claims: What You Need to Know

**HISTORY:** In the early 19<sup>th</sup> century, the phrase whistle blower was synonymous with the title referee in a sporting event. However, after the phrase “blow the whistle” became a common reference for reporting a crime, “whistle blower” morphed into today’s term “whistleblower,” and referees had to settle for the name zebras, at least that name can be put in print, but that is a story for another day.

The well-known jailhouse maxim, “snitches get stitches” paints a vivid picture and lends clarity to the word “retaliation.” Retaliation by employers is of course illegal, and is actionable in the world of the Occupational Safety and Health Administration (OSHA). In other words, employers often face claims of retaliation from employees who have blown the whistle, when those employees believe that an adverse employment action has been taken against them because they snitched...I mean reported an alleged violation of the law to OSHA.

**Foley & Foley, PC has the experience and will defend its clients against claims of retaliation by employees who have blown the whistle (a/k/a “whistleblower complaints”).**

**CLAIM:** For employers, these cases begin with notice from OSHA that it is undertaking an investigation of a claim of alleged retaliation. This is the time to seek legal counsel. OSHA will demand a list of information and documents from the employer. Through the investigation, OSHA seeks to determine whether there is “reasonable cause” to believe a violation of the law has occurred. OSHA enforces more than twenty whistleblower protection laws, so there are many possible legal issues to consider when facing an investigation.

**DEFENSE:** Employers therefore need guidance and help in responding to an OSHA investigation. Providing too much information, or not enough, or the wrong information during the investigation can result in a negative decision. We help guide our clients through that investigation to improve the clients chances of receiving a favorable decision from OSHA.

**STANDARD:** In the event that OSHA finds “reasonable cause” to believe a violation occurred, OSHA will seek to penalize the employer. We defend our clients against the implementation of the penalties.

**WHY NOW?** Given the recent Guidance from OSHA concerning Covid19, we anticipate an increase of claims from employees who report alleged unsafe Covid19-related conditions to OSHA. If your business is notified of a claim by OSHA, or receives a complaint direct from an employee, we can help.



## General Counsel's Office Hours Special Member Benefit



All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

[Click here](#) for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. [Click here](#) for Mike's bio.