MILLER & MARTIN

New DOL Regulations Provide Additional Information to Employers Regarding the FFCRA
(Expanded Version)

As a parting April Fool's Day gift late on April 1 – and right on time per the timetable set forth in the Families First Coronavirus Response Act ("FFCRA") – the Department of Labor ("DOL") issued its 40 pages of temporary regulations (along with 84 pages of additional comments) concerning the two FFCRA leave sections, which are the Emergency Family and Medical Leave Expansion Act ("EFMLEA") and the Emergency Paid Sick Leave Act ("EPSLA").

As anticipated, most of the substantive provisions were addressed in the DOL's "Families First Coronavirus Response Act: Questions and Answers" FAQ document that we previously **summarized here**. Those who are coming to the party late also may want to review our alert titled **"The Families First Coronavirus Response Act As Signed Into Law,"** which outlines the general provisions of the FFCRA.

Here are some additional details included in the temporary regulations which were not previously provided in the FAQ document.

If you don't have time to review the whole document below, we have bolded the key information for you.

1. **"Childcare providers"** do **not** have to be **paid IF** they are a "family member or friend who regularly cares for the employee's child."

2. **"Quarantine Orders"** include "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, causing those categories of Employees to be unable to work even though their Employers have work for them."

3. **An Employee subject to a quarantine or isolation order may not use Paid Sick Leave or Expanded FMLA Leave *where the Employer does not have work for the Employee as a result of the order or other circumstances*. So, if YOU as the employer are CLOSED due to the same quarantine or shelter-at-home order which is causing your employees not to be able to work or telework, these employees do not qualify to use the new Paid Sick Leave or Expanded FMLA Leave benefit.**

An easy way to think of this is – if the employee is at home because YOU have asked them to be home because YOU do not have work for them, then they do NOT qualify for the new Paid Sick Leave. But if they are at home due to a MEDICAL or GOVERNMENTAL ORDER, they would qualify for this new benefit (as again, the new Expanded FMLA Leave can only be used to care for children whose school or other childcare provider is closed or unavailable due to COVID-19 precautions, NOT due to a medical or governmental quarantine order). Similarly though, if YOU have sent an employee home because you do not have work for them, they cannot use the Expanded FMLA Leave to cover time YOU do not need them to work (even if they are also caring for children whose schools or other childcare providers are closed/unavailable due to COVID-19 precautions during this time).

4. We did NOT receive any additional guidance on what 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"** is, aside from to say "the substantially-similar condition may be defined at any point during the Effective Period, April 1, 2020, to December 31, 2020."

So, it is safe to say no such condition exists *yet*, such that *no one* would qualify for paid leave under "#6" on the new FFCRA poster.

5. We DID receive additional information as to who the **"individuals"** an employee may **"care for"** who are under a medically advised or governmental quarantine order are. This "means 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* [such as a roommate]. *For this purpose, 'individual' does not include persons with whom the Employee has no personal relationship."*

6. A related question we have been receiving on this point is **"what if there are multiple people who could care for such 'individuals,' does the employee still qualify for paid sick leave to care for them?"**

No additional guidance was provided on this point aside from language stating that the individual must "depend on the Employee to care for him/her."

7. **We DID receive additional guidance on this question when it comes to "caring for" children who are out of school or when their regular childcare provider is unavailable due to COVID-19 related reasons.**

Here, the DOL said, "Moreover, an employee may take paid sick leave to care for his or her child *only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual— such as a co-parent, co-guardian, or the usual childcare provider—is available to provide the care the employee's child needs.*" "Employee has a 'need' to take Expanded FMLA Leave for this purpose *only if no suitable person is available to care for his or her Son or Daughter during the period of such leave*."

8. The new regulations also affirm that, like "regular FMLA leave" "[t]he taking of Paid Sick Leave or Expanded FMLA Leave shall not impact an Employee's status or eligibility for any exemption from the requirements of section 6 or 7, or both, of the Fair Labor Standards Act." **(So, an exempt employee who is not receiving full pay due to using paid leave under the FFCRA will not lose his/her exempt status on this basis.)**

9. There is one point on which the new regulations differ from the information previously provided in the DOL FAQ document – and that is **regarding the "concurrent" use of leave which is already provided under the employer's existing leave policies.**

The FAQ document said that "both the employee and the employer had to agree" before an employee could either use such leave "concurrently" with Expanded FMLA Leave or use such

leave to "supplement" their 2/3 partial pay as provided under the Expanded FMLA section of the FFCRA.

The new temporary regulations (more in line with the "regular FMLA") state that "Section 2612(d)(2)(A) of the FMLA shall be applied, provided however, that the Eligible Employee *may elect, and the Employer may require* the Eligible Employee, to use only leave that would be available to the Eligible Employee for [the purpose of caring for a child whose school or regular child care is closed or otherwise unavailable due to COVID-19 related reasons] under the Employer's existing policies, such as personal leave or paid time off. *Any leave that an Eligible Employee elects to use or that an Employer requires the Eligible Employee to use would run concurrently with Expanded FMLA Leave taken under this section.*"

So, at least with regard to the Expanded FMLA Leave paid benefit (which again can **only** be used to care for a child whose school or regular child care is closed or otherwise unavailable due to COVID-19), employers apparently may **require** employees to use their accrued existing paid leave **OR** employees may **choose** to do so (again as is normally the case regarding "regular FMLA leave") rather than both having to agree to this as stated in the FAQ document.

The new regulations further state that "if an Eligible Employee elects or is required to use leave available to the Eligible Employee for the purpose [described above] under the Employer's policies, such as vacation or personal leave or paid time off, concurrently with Expanded FMLA Leave, the Employer must pay the Eligible Employee a full day's pay for that day. However, the Employer is capped at taking $200 a day or $10,000 in the aggregate in tax credits for Expanded FMLA Leave paid under the [FFCRA]."

10. **The new regulations also clarify that as far as determining "when" an employee has been employed with you for "at least 30 calendar days,"** this measurement is based on "whether (i) the Employer had the Employee on its payroll for the thirty calendar days *immediately prior to the day that the Employee's leave would begin*; or (ii) the Employee was laid off or otherwise terminated by the Employer on or after **March 1, 2020**, and rehired or otherwise reemployed by the Employer on or before December 31, 2020, provided that the Employee had been on the Employer's payroll for thirty or more of the sixty calendar days prior to the date the Employee was laid off or otherwise terminated."

They also provide that "If an Employee employed by a temporary placement agency is subsequently hired by the Employer, *the Employer will count the days worked as a temporary Employee at the Employer toward the thirty-day eligibility period*" (which is similar to how time employed with a temporary agency also is treated under the "regular FMLA").

11. **The regulations also clarify regarding whether an employer has "fewer than 500 employees," that this calculation must be made as follows:**

"The Employer must count all full-time and part-time Employees employed within the United States *at the time the Employee would take leave*. *For purposes of this count, every part-time Employee is counted as if he or she were a full-time Employee.*"

12. Several employers were hoping that more guidance would be provided regarding the **"health care provider"** and **"emergency responder"** optional exemptions for employers to use to exempt certain employees from receiving the new paid leave benefits.

The regulations largely mirror the FAQ we previously summarized in the alert referenced above. We are providing the definitions provided in the FAQ document again here with the slight changes made in the new regulations italicized.

For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded FMLA Leave by their Employer under the FFCRA, a **health care provider** is anyone employed at any doctor's office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of these *institutions* described above to provide services or to maintain the operation of the facility *where that individual's services support the operation of the facility*. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs,vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

Then regarding "**emergency responders,**"

For the purposes of Employees who may be excluded from Paid Sick Leave or Expanded FMLA Leave by their Employer under the FFCRA, an **emergency responder** is *anyone* necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed *for the response to COVID-19*. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, *child welfare workers and service providers*, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory,

Interestingly, the new regulations do NOT include the "To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt [health care providers/emergency responders] from the provisions of the FFCRA" cautionary note to employers.

13. We have also received some questions as to **whether there are any special provisions in the FFCRA regarding "religious institutions or other non-profit organizations."**

The new regulations do mention these entities, but only to say that they are eligible to apply for the same "small business (under 50 employees)" exemption to the FFCRA as all other small businesses. (Please see item 25 of our prior DOL FAQ Summary for additional information on this exemption, as it was unchanged in the new regulations.)

One clarification that was provided regarding this "small business" exemption was that although nothing has to be submitted to the DOL in order to "apply for" or otherwise "qualify for" this exemption, "the Employer must document that a determination has been made by an authorized officer of the business pursuant to the criteria [described in item 25 of the prior DOL FAQ Summary alert]" **and must keep this documentation for four years**.

The new regulations also clarify that employers who believe they qualify for this exemption "regarding certain employees" still **must display the poster** which has been mandated by the DOL regarding this new law. (Download the poster here.)

14. **The new regulations also do not change the prior FAQ document information regarding intermittent use of Paid Sick Leave and Extended FMLA Leave** (please see items 10 and 11 of our prior DOL FAQ Summary) **aside from one significant point.**

Specifically, regarding the comment in the FAQ document that *if an employee ends up not using all of his/her 80 hours/ten business days of paid sick leave due to one of the following reasons:* (1) for his/her own quarantine; (2) due to having COVID-19 symptoms and seeking a medical diagnosis; (3) due to experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services; or (4) to care for another individual who is under quarantine *this employee may still use the remaining week of paid sick leave at another time between April 1 and December 31, 2020*. This comment does not appear in the new regulations. Instead, they expressly say, **"Once the Employee begins taking Paid Sick Leave for one or more of such reasons, the Employee must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take Paid Sick Leave."**

They also note that an "Employer and Employee may memorialize any agreement regarding intermittent leave in writing," but that "a clear and mutual understanding between the parties is sufficient." [Jaded employment attorney note – "memorialize them in writing!"]

15. **The new regulations also provide further clarity on the interaction between Paid Sick Leave and Expanded FMLA Leave.**

Specifically,

a. Employees may choose to use Paid Sick Leave to run concurrently with Expanded FMLA Leave during the first two (2) weeks when Expanded FMLA Leave is otherwise unpaid.

b. However, if an employee has already used some or all of his/her Paid Sick Leave for a purpose which is not also covered by Expanded FMLA Leave (which would be any of the 6 purposes outlined on the DOL FFCRA poster *aside from* #5 "caring for a child whose school or

place of care is closed or child care provider is unavailable due to COVID-19 related reasons"), **then** the Expanded FMLA Leave either will be unpaid OR the employee may choose to **substitute** "pre-existing paid leave provided by the Employer which has been earned or accrued pursuant to the established policies of the Employer to run concurrently with the Expanded FMLA Leave."

"If the Eligible Employee does not elect to substitute paid leave for unpaid Expanded FMLA Leave under the above conditions and circumstances, the Eligible Employee will remain entitled to any paid leave that the Eligible Employee has earned or accrued under the terms of his or her Employer's plan."

16. **The new regulations also affirm that "neither the Employee nor the Employer may require the Employee to 'substitute' the Employee's accrued paid leave (under the Employer's paid leave plan) during an Expanded FMLA Leave" (since unlike "regular FMLA leave" during which employers MAY make such a requirement) "Expanded FMLA Leave is not unpaid."**

Both the Employer and the Employee may **agree** that the Employee may **supplement** his/her Paid Sick Leave and Expanded FMLA Leave benefits with existing employer-provided vacation, sick leave, or other PTO.

17. There was also a question based on the text of the FFCRA as to whether or not employers were free to change their existing paid leave policies after this new law went into effect on April 1, 2020 in order to take this new law into consideration, perhaps by transferring or "designating" some existing paid leave so as to satisfy the requirements of the FFCRA.

The temporary regulations make it clear that this is not an option for employers by stating that "An Employee's entitlement to, or actual use of, Paid Sick Leave under the EPSLA is *in addition to—and shall not in any way diminish, reduce, or eliminate*—any other right or benefit, including regarding Paid Sick Leave, to which the Employee is entitled under any of the following: (i) another Federal, State, or local law, except the FMLA as provided in § 826.70; (ii) a collective bargaining agreement; *or (iii) an Employer policy that existed prior to April 1, 2020.*

18. The new regulations also clarify that employees are free to **choose** to use the new Paid Sick Leave benefit **before** any other leave they have available under any other federal, state, or local law, collective bargaining agreement, or Employer policy "which existed prior to April 1, 2020."

19. **The new regulations also provide an interesting note regarding the use of Expanded FMLA Leave in terms of how much of this "new type of FMLA leave" may be used "in a 12-month period."**

As previously explained in item 9 of the FAQ Summary alert, "Expanded FMLA Leave" counts against an employee's "regular FMLA leave" entitlement. However, the new regulations clarify that "An Eligible Employee can take a maximum of twelve workweeks of Expanded FMLA Leave during the period in which [this new type of leave] may be taken (April 1, 2020 to

December 31, 2020) even if that period spans two FMLA leave twelve-month periods. For example, if an Employer's twelve-month ["regular FMLA leave" tracking] period begins on July 1, and an Eligible Employee uses seven weeks of Expanded FMLA Leave in May and June, 2020, the Eligible Employee could only use up to five additional weeks of Expanded FMLA Leave between July 1 and December 31, 2020, even though the first seven weeks of Expanded FMLA Leave fell in the prior twelve-month period."

(Yet another reason to use a "rolling look back 12-month 'regular FMLA leave' tracking method." You do not have to worry about the above "interesting note" unless you use some type of "fixed year" tracking method such as tracking "regular FMLA leave" using the calendar year, your fiscal year, or some other fixed year method such as each employee's individual hire date anniversary.)

20. **There is also a note that the new FFCRA DOL poster does not have to be translated into other languages aside from English.**

21. Regarding **employee benefits**, as with "regular FMLA leave" although you **do** have to maintain the same group health plan benefits provided to an employee prior to taking Paid Sick Leave or Expanded FMLA leave during the leave, **if** "an Employer provides a new health plan or benefits or changes health benefits or plans while an Employee is taking Paid Sick Leave or Expanded FMLA Leave, the Employee is entitled to the new or changed plan/benefits to the same extent as if the Employee was not on leave. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all Employees of the workforce would also apply to Employees taking Paid Sick Leave or Expanded FMLA Leave. Notice of any opportunity to change plans or benefits must also be given to an Employee taking Paid Sick Leave or Expanded FMLA Leave. If the Employee requests the changed coverage, the Employer must provide it."

"An Employee may choose not to retain group health plan coverage while an Employee is taking Paid Sick Leave or Expanded FMLA Leave. However, when an Employee returns from leave, the Employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc." (just as is the case regarding "regular FMLA leave")

"Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), an Employer's obligation to maintain health benefits while an Employee is taking Paid Sick Leave or Expanded FMLA Leave ceases under this section if and when the employment relationship would have terminated if the Employee had not taken Paid Sick Leave or Expanded FMLA Leave (e.g., if the Employee fails to return from leave, or if the entitlement to leave ceases because an Employer closes its business)."

22. Regarding some employers' concern with the "non-retaliation" provision of the FFCRA as far as affecting their ability to lay off employees on leave, the new regulations clarify that, as with "regular FMLA leave," **"[a]n Employee is not protected from employment actions, such as layoffs, that would have affected the Employee regardless of whether he or she took leave. In order to deny restoration to employment, an Employer must be able to show that**

an Employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment."

The "key employee" exception to the reinstatement obligation which applies to "regular FMLA leave" also applies to Expanded FMLA Leave.

23. The new regulations also speak to the **timing** of **an employee's notice of the need to use one of the two new types of leave provided under the FFCRA.** Well, kinda. . . Can you say "be *fluid*?"

"An Employer may require an Employee to follow reasonable notice procedures after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave for any reason other than to care for a child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons. *Whether a procedure is reasonable will be determined under the facts and circumstances of each particular case.* Nothing in this section precludes an Employee from offering notice to an Employer sooner; *the Department encourages, but does not require, Employees to notify Employers about their request for Paid Sick Leave or Expanded FMLA Leave as soon as practicable."*

"In any case where an Employee requests leave in order to care for the Employee's child whose school or place of care is closed or childcare provider is unavailable due to COVID-19 related reasons, if that leave was foreseeable, an Employee shall provide the Employer with notice of such Paid Sick Leave or Expanded FMLA Leave *as soon as practicable*."

"If an Employee fails to give proper notice, the Employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave."

"**Notice may not be required in advance and may only be required after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave or Expanded FMLA Leave.** *After the first workday*, it will be reasonable for an Employer to require notice *as soon as practicable* under the facts and circumstances of the particular case. Generally, it will be reasonable for notice to be given by the Employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the Employee is unable to do so personally."

"Generally, it will be reasonable for an Employer to require oral notice and sufficient information for an Employer to determine whether the requested leave is covered by the FFCRA. An Employer may not require the notice to include documentation beyond what is [described in item 24 below]."

"Generally, it will be reasonable for the Employer to require the Employee to comply with the Employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances."

So good luck with [not] enforcing this *fluid* "notice" provision!

24. We have intentionally saved the "best (and longest) for last" – as far as answering the "most burning question asked by our employer clients over the past 2 weeks."

WHAT ABOUT DOCUMENTATION??????????????

Unlike the FAQ document (which ironically DID at one point provide additional detail regarding employee documentation requirements but mysteriously removed this between March 27 and March 30), the new regulations DO provide employers with some much-requested detail as to WHAT DOCUMENTATION EMPLOYEES ARE REQUIRED TO PROVIDE in order to be able to use either the new Paid Sick Leave or Expanded FMLA Leave benefits. **Specifically,**

(a) An Employee is required to provide the Employer documentation containing the following information prior to taking Paid Sick Leave under the EPSLA or Expanded FMLA Leave under the EFMLEA:
(1) Employee's name;
(2) Date(s) for which leave is requested;
(3) Qualifying reason for the leave; and
(4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

(b) To take Paid Sick Leave relating to a Quarantine or Isolation Order or a health care provider's self-quarantine advice, an Employee must additionally provide the Employer with the name of the government entity who issued the Order or the health care provider who advised the Employee to self-quarantine due to concerns related to COVID-19.

(c) To take Paid Sick Leave or Expanded FMLA Leave to care for a child whose school or childcare provider has closed or otherwise become unavailable, an Employee must additionally provide:
(1) the name of the Son or Daughter being cared for;
(2) the name of the School, Place of Care, or Child Care Provider that has closed or become unavailable; and
(3) a representation that no other suitable person will be caring for the child during the period for which the Employee takes Paid Sick Leave or Expanded FMLA Leave.

Employers may also request such additional material as needed to support a request for tax credits pursuant to the FFCRA. **The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.** For more information, please consult https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

Employers are required to keep all documentation provided as described above for four years, "regardless whether leave was granted or denied."

If an Employee provided oral statements to support his or her request for Paid Sick Leave or Expanded FMLA Leave, the Employer is required to document and maintain such information in its records for four years.

In order to claim tax credits from the Internal Revenue Service (IRS), an Employer is advised to maintain the following records for **four years**:

(1) Documentation to show how the Employer determined the amount of paid sick leave and expanded family and medical leave paid to Employees that are eligible for the credit, including records of work, **telework**, and Paid Sick Leave and Expanded FMLA Leave;

(2) Documentation to show how the Employer determined the amount of qualified health plan expenses that the Employer allocated to wages;

(3) Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;

(4) Copies of the completed IRS Forms 941 that the Employer submitted to the IRS or, for Employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the Employer's entitlement to the credit claimed on IRS Form 941; and

(5) Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. For more information consult https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

25. We couldn't leave you hanging with 24 – the very last new temporary regulation provides one more unique provision for employers – regarding the question of **what if an employee changes employers during the period of April 1, 2020 – December 31, 2020 and they have already used some or all of their Paid Sick Leave with the prior employer, do they get to start over again with the new employer?**

The answer to this question is **no**. "Employees only get a maximum total of 80 hours of Paid Sick Leave regardless of the Employer providing it."

The remainder of the new regulations also provided some additional detail regarding how to compute various FFCRA-related amounts like "hours worked" and "regular rate of pay," which for most employers will be straightforward, but please feel free to contact us if you need assistance with these calculations.

We Can Help

This (hopefully!) will close the "FFCRA firehose" regarding the new paid leave provisions -- for a little while at least. We will continue to keep you updated regarding other evolving issues such as the IRS regulations regarding the tax credits which correspond to these new paid leave provisions and other key provisions of the FFCRA through Miller & Martin's Coronavirus Resources Center. For advice concerning your particular situation or the applicability of any of our general COVID-19 or FFCRA alert materials to your company, please feel free to contact any member of our Labor & Employment Law Practice Group.