Expanded family and medical leave provisions of the FFCRA

Q: Are employees employed via a collective bargaining agreement covered?

Yes, depending on the language of the collective bargaining agreement at issue. The Families First Coronavirus Response Act ("FFCRA") does not exempt collectively bargained employees from coverage. However, the Act specifically states that its provisions may not operate to diminish benefits contained in collective bargaining agreements, which is consistent with how collective bargaining agreements function in conjunction with other employment laws.

Collective bargaining agreements can provide greater benefits and protections than those available under the FFCRA but cannot provide less, so if there are greater benefits for sick or childcare leave in the collective bargaining agreement than in the FFCRA, the collective bargaining agreement would trump the FFCRA's protections.

The FFCRA also contains specific provisions for multiemployer bargaining agreements. The Act permits employers signatory to multiemployer bargaining agreements, consistent with their bargaining obligations and their collective bargaining agreement, to fulfill their obligations under the Act by making contributions to a multiemployer fund, plan, or program based on the hours of paid sick time each of their employees is entitled to under the Act while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure paid sick leave and paid family leave on at least the same terms as the FFCRA provides from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement and for the uses specified. We are not aware of any health funds affiliated with any trades with whom ACCNJ bargains that provide such paid sick leave and/or family medical leave.

Q: Are any of the provisions of the FFCRA retroactive?

No. The Emergency Paid Sick Leave Act imposes new leave requirements on employers that are effective beginning on April 1, 2020.

Q: What forms will be made available to employers to have employees complete prior to being paid under the FFCRA?

The Department of Labor has not yet provided forms for this purpose. Forms may be provided when new guidance is published after April 1, 2020.

However, according to the Department of Labor, if an employer's employee takes paid sick leave under the Emergency Paid Sick Leave Act, the employer must require the employee to provide it with (and the employee must provide) appropriate documentation in support of the reason for the leave, including: the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. Documentation of the reason for the leave will also be necessary, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised the

employee to self-quarantine. For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a healthcare provider advising the employee to self-quarantine due to concerns related to COVID-19. If the employer intends to claim a tax credit under the FFCRA for payment of the sick leave wages, the employer should retain this documentation in its records. The employer should also consult applicable Internal Revenue Service ("IRS") forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.

If an employer's employee takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19, under the Emergency Family and Medical Leave Expansion Act, the employer must require the employee to provide it with appropriate documentation in support of such leave, just as would be provided for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or daycare website, or published in a newspaper, or an email from an employee or official of the school, place of care, or childcare provider. This requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason. If the employer intends to claim a tax credit under the FFCRA for the expanded family and medical leave, the employer should retain this documentation in its records. The employer should also consult applicable IRS forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.

Employers with more than 500 employees are excluded.

Q: How do you determine if you are an employer with under 500 employees?

The Department of Labor issued preliminary, informal guidance on March 25, 2020 in Question and Answer form in an attempt to answer this question. The Question and Answer are quoted below. The Department intends to provide more detailed guidance after April 1, 2020.

> ***As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?***
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> *You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.*

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

Based on the above, an employer is covered if, at the time the leave is to be taken, the business employs fewer than 500 employees. Separate entities are counted as one employer under the FFCRA if two or more entities are found to be "joint employers" under the Fair Labor Standards Act ("FLSA") or if two or more entities are an "integrated employer" under the Family Medical Leave Act ("FMLA"). If the entities meet either of those standards, all of the employees of each entity will be counted in determining employer coverage for purposes of the FFCRA.

When assessing whether a "joint employer" relationship exists under the FLSA, the following non-exhaustive list of relevant factors are considered: (1) the alleged employer's authority to hire and fire the relevant employees; (2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment including compensation, benefits, work schedules, and the rate and method of payment; (3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and (4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes.

In the integrated employer context, the criteria analyzed is whether several entities are properly seen as a single employer despite being nominally and technically distinct. In performing this analysis, the following considerations should be taken into account: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control Emphasis should be placed on the need to examine economic realities as opposed to corporate formalities.

To determine whether one entity can include other entities' employees when counting for FFCRA purposes, a careful factual examination of each element of both the "joint employer" and "integrated employer" tests must be conducted

The "joint employer" and "integrated employer" tests are normally used for FMLA purposes to ensure proper coverage for employees who work for employers with under 50 employees.

Considering the intent of the Act, until more formal guidance is provided by the Department of Labor, if an entity does not normally employ 500 or more employees on its own, it should be cautious when considering refusing to provide leave under the FFCRA based on the joint employer or integrated employer tests.

Q: If you are an employer that has more than 500 employees, does that mean none of the provisions of the FFCRA apply?

Both the Emergency Paid Sick Leave Act and Emergency Family Medical Leave Expansion Act only apply to private employers with less than 500 employees. Public employers are generally covered regardless of size.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

Q: What is the process for applying for that exemption?

The Department of Labor has stated that it will issue additional exemption criteria in future regulations. It suggests that employers that intend to apply for the exemption should document why their business meets the criteria but should not send that documentation to the Department of Labor.

According to Department of Labor guidance, an employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. 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
3. 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.

Q: What constitutes an employer with under 50 employees? Is it the same method used to calculate employees with 500 or more?

The Department of Labor's guidance does not include an explanation of how to calculate the 50-employee threshold the way it does the 500-employee threshold. Further guidance on that issue should be forthcoming.

Without additional guidance from the Department of Labor, it seems likely that the method to calculate the 50-employee threshold will be the same as it is under the Family and Medical Leave Act which is discussed in further detail above under the section relating to calculation of employers with under 500 employees.

Q: Does this exemption apply to the paid sick leave provisions of the act as well?

The FFCRA states that the Department of Labor has the power to implement regulations exempting small businesses with under 50 employees from the requirement to provide leave *due to school closings or child care unavailability* under both the Emergency Family Medical Leave Expansion Act and the Emergency Paid Sick Leave Act if the leave requirements would jeopardize the viability of the business as a going concern.

The five other bases for paid leave under the Emergency Paid Sick Leave Act are not subject to the small business exemption.

Q: If the Governor shuts down construction projects after April 1, 2020, can employers layoff their employees to avoid triggering expanded family and medical leave under the FFCRA?

Once the FFCRA is in force on April 1, 2020, employees who meet the eligibility requirements are entitled to paid leave under the Act. According to Department of Labor guidance, if a worksite is closed or an employee is otherwise laid off due to lack of work either before or after April 1, 2020, the employee would not be entitled to paid sick leave of family medical leave. If the employee is already on sick or family medical leave when the workplace shutdown occurs, the employer must pay for any paid sick leave or expanded family and medical leave used before the employer closed.

As stated above, the FFCRA does not specifically prohibit layoffs. However, the Act does include prohibitions for discrimination and retaliation against employees who: (1) take leave in accordance with the Act; and (2) file any complaint or institute or cause to be instituted any proceeding under or related to the Act (including a proceeding that seeks enforcement of the Act), or has testified or is about to testify in any such proceeding.

While the FFCRA does not specifically state (nor do the preliminary regulations address) that employers will be in violation of the law for laying off otherwise eligible employees to avoid paid leave, in similar situations (like where eligible employees are terminated so the employer can avoid allowing Family and Medical Leave Act leave), Courts have generally found that

anticipatory terminations to avoid allowing eligible employees to enforce their rights are unlawful.

However, if the layoff arises because no work is available due to the shut-down order, the layoffs would not be in anticipation or response to the employees taking leave and are not barred by the Act. It is likely that further guidance on this issue will be provided by the Department of Labor.

Types of Paid Leave

Medical Leave under the FFCRA:
Two weeks (up to 80 hours) of expanded medical leave at the employee's regular rate of pay up to $511 per day and $5,110 in the aggregate, where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis.

Q: Is there a time period they have to get the medical diagnosis?

Neither the Act, nor the preliminary guidance from the Department of Labor provide specific deadlines for diagnosis to occur. Due to the lack of available testing at this point, it is unlikely that such a deadline would be appropriate. At this point, the Act is only in effect until December 31, 2020, however.

Q: What type of proof do they have to provide to the employer that it was or was not COVID-19?

Pursuant to the guidance provided by the Department of Labor, the employee must provide written documentation that he or she needed leave for a covered purpose. Department of Labor guidance states that the employer does not have provide paid leave for such a purpose until documentation is provided by the employee. For example, written documentation by a healthcare provider advising the employee to self-quarantine due to concerns related to COVID-19 is sufficient.

Q: What happens if it comes back negative? Is the employer still responsible to pay them?

Yes. Under the FFCRA, an employee is entitled to paid emergency sick leave as long as they were experiencing symptoms of COVID–19 and seeking a medical diagnosis. The results of the diagnosis is not controlling.

Q: How quickly does the employer have to issue that pay?

The FFCRA does not specify when payment under the Act is due, but under the Fair Labor Standards Act generally, pay must be provided on the next pay period.

Q: Can an employee be laid off and another employee requested from the hiring hall to replace him?

No. An employer cannot lay off an employee while he is on FFCRA leave so that it can replace him or her with another employee from the hiring hall. However, an employer can request a temporary employee from the hiring hall to fill the employee's role for the time he or she is on FFCRA covered leave.

The extent of the employer's obligation to return an employee to work after leave depends on the number of employees it has. Employers with 25 of more employees have the same obligations under the FMLA to return employees who have taken leave under the FFCRA to the same or equivalent position at the end of the leave.

Employers with less than 25 employees, on the other hand, are excluded from that requirement if the employee's position no longer exists following the emergency leave due to economic conditions or other changes in operating conditions of the employer that affect employment; and are caused by a public health emergency during the period of leave. The employer is required to make reasonable efforts to return the employee to an equivalent position and must continue those efforts for a year after the employee's leave.

Q: If an employee tests positive for COVID-19, is there any obligation for the employer to notify the employees with whom the positive tested employee worked that they were exposed? Are the exposed employees entitled to medical leave and if so is it at the full pay or at the 2/3's pay described below?

Due to the nature of the virus, guidance from the CDC and other federal, state and local agencies is rapidly evolving. Employers should take steps to stay aware of the most recent guidance.

According to the CDC and OSHA, prompt identification and isolation of potentially infectious individuals is a critical step in protecting workers, customers, visitors, and others at a worksite. Employers should inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure. Employers should develop policies and procedures for employees to report when they are sick or experiencing symptoms of COVID-19. Where appropriate, employers should develop policies and procedures for immediately isolating people who have signs and/or symptoms of COVID-19, and train workers to implement them.

If an employee tests positive, the employer should notify the employees who worked in close proximity to the employee (for the definition of "close proximity," employers should consult up-to-date guidance from the CDC as this is a rapidly-changing situation) that they may have been exposed. The employer should not identify the infected employee, particularly by name, to anyone to avoid violating confidentiality requirements. The exposed employees should then self-monitor for symptoms.

According to the CDC, if the employer is located in an office building with other tenants, building management should be informed that an (unidentified) employee was diagnosed with COVID-19 so that precautions can be taken and the area can be decontaminated.

The CDC provides guidance on its website on how to disinfect a workplace in which an employee tests positive for COVID-19: https://www.cdc.gov/coronavirus/2019-ncov/prepare/disinfecting-building-facility.html

Employees who test positive or are showing symptoms should be sent home for quarantine purposes. They should be permitted to telework if possible.

If exposed employees without symptoms are sent home by the employer for quarantine purposes, they should be permitted to telework, if possible. If employees are sent home by the employer and cannot telework or cannot telework and are: (1) subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, they should be entitled to their regular rate of pay for up to 80 hours under the Emergency Paid Sick Leave Act.

Q: Is there a minimum period of time the employee had to work for the employer in order to be eligible for medical leave at full pay?

No. There is no minimum amount of time an employee must be employed to be eligible for paid sick leave under the Emergency Paid Sick Leave Act.

It is important to note that "medical leave at full pay" is only available under the Emergency Paid Sick Leave Act. Under that Act, if an employee takes paid sick leave because he or she is unable to work or telework due to a need for leave because he or she: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or (3) is experiencing symptoms of COVID-19 and is seeking medical diagnosis, the employee is entitled to receive for each applicable hour the greater of:

- His or her regular rate of pay;
- The federal minimum wage in effect under the FLSA; or
- The applicable State or local minimum wage.

In these circumstances, the employee is entitled to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

Q: If an individual is advised by his or her Physician not to work because he or she has underlying health conditions and should not put him or herself at risk of contracting COVID -19 would he or she be entitled to paid medical leave benefits at full page and/or

two-third pay (2/3) pay. Does the employer have the option to lay-off that individual and request someone else from the Hiring Hall?

Because one of the qualifying reasons for Emergency Paid Sick Leave entitlement is "the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19," the employee would be entitled to full pay for 80 hours of leave (unless he or she is a part-time employee, which requires a separate calculation).

The employer does not have the option of laying off the individual because he or she is on FFCRA leave and requesting someone else from the hiring hall. There is no specific prohibition in the Act for asking for temporary labor to get work done while the employee is out, but a layoff for the purpose runs afoul of the Act.

Q: If the employee was only slated to work for a shorter period of time than two weeks, does the employer have the option of laying off?

While there is no specific guidance from the Department of Labor on the issue, if the employee seeks Emergency Paid Sick Leave and it is uncontradicted that the employee was only engaged to be employed for a short period of time, it is most likely that the employee would only be entitled to paid leave for the remaining amount of the engagement.

The Emergency Paid Sick Leave Act states that sick leave is to be "(i) provided by an employer for use during an absence from employment *for a reason described in any paragraph of [the Act]*; and (ii) is calculated based on the employee's required compensation under subparagraph (B) and *the number of hours the employee would otherwise be normally scheduled to work.*"

Because the short-term employee's absence from employment at the end of his or her engagement is not because of a covered reason and the sick pay is to be based on "the number of hours the employee would otherwise be normally scheduled to work," (which in the case of an employee at the agreed-upon end of his employment is zero) these provisions support the conclusion that the short-term employee would only be entitled to paid leave for hours the employee would have otherwise been scheduled to work. The guidance provided by the Department of Labor in connection with layoffs and worksite closures referenced above also supports this conclusion.

Two weeks (up to 80 hours) of expanded medical leave at two-thirds the employee's regular rate of pay up to $200 per day and $2,000 in the aggregate, because the employee is unable to work because of a bona fide need to:

* ***Care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider)***

* ***Care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19***

* ***The employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.***

Q: Is there a minimum period of time the employee had to work for the employer in order to be eligible for medical leave at two-thirds (2/3) pay?

As mentioned above, under the Emergency Sick Paid Leave Act, there is no minimum amount of time the employee has to work for the employer to receive benefits (either full pay or 2/3 pay, depending on the reason for the leave).

Under the Emergency Sick Paid Leave Act, the employee is entitled to 2/3 pay for the first 80 hours of leave for the following reasons:

- *Care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider)*
- *Care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19*
- *The employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.*

Under the Emergency Family and Medical Leave Expansion Act for childcare leave (which is leave at 2/3 pay up to certain caps) on the other hand, the employee has to be employed for at least 30 days to meet the definition of a covered employee. Pursuant to Department of Labor guidance, an employee is considered to have been employed by an employer for at least 30 calendar days if the employer had him or her on its payroll for the 30 calendar days immediately prior to the day leave would begin. For example, if an employee wants to take leave on April 1, 2020, he or she would need to have been on the employer's payroll as of March 2, 2020.

If the employee had been working for a company as a temporary employee, and the company subsequently hires the employee on a full-time basis, the employee may count any days previously worked as a temporary employee toward this 30-day eligibility period.

Q: In the case of caring for a minor child that is not in school, how does the employer verify the employee's eligibility in terms of whether there is another parent who is available for the minor child? What happens if they pay the employee and later it is determined another parent claimed the same benefit? Will both employers get the tax credit?

As set forth above, an employer should require an employee to provide sufficient documentation to confirm the reason for leave. For example, in the case of a childcare leave, such documentation could include a notice that has been posted on a government, school, or day care

website, or published in a newspaper, or an email from an employee or official of the school, place of care, or childcare provider.

There is no specific language in the Act or preliminary guidance that prohibits asking if another adult is available to take care of the child. However, the Act states that a "qualifying need related to a public health emergency" exists with respect to leave "when the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the 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." The Act defines "child care provider" as a provider who receives compensation for providing child care services on a regular basis, including an "eligible child care provider." The Act does not speak in terms of "available adults" or "available parents."

In the event a fraud of any sort is discovered later, it may be appropriate to take remedial action against the employee, depending on the circumstances.

While there is no guidance yet on this point, if each employer obtains reasonable documentation to confirm the legitimacy of the reason for requested leave, it is more likely than not that the employer would receive the tax credit.

Family Leave under the FFCRA:

A covered employer must provide to employees that it has employed for at least 30 days:

* ***Up to an additional 10 weeks of expanded family and medical leave at two-thirds the employee's regular rate of pay up to $200 per day and $12,000 in the aggregate, where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19. (This applies after the two weeks of medical leave provided.)***

Q: In the case of caring for a minor child that is not in school, how does the employer verify the employee's eligibility in terms of whether there is another parent who is available for the minor child? What happens if they pay the employee and later it is determined another parent claimed the same benefit? Will both employers get the tax credit? (THIS IS THE SAME QUESTION AS ABOVE)

Same answer as above.

Tax Credits:

* Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA.

* Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

Q: Do employers pay all fringe benefits on these hours or do they only pay health benefits?

Health fund contributions must be made for family medical leave payments under the FFCRA due to the fact that the Emergency Family and Medical Leave Expansion Act amends the FMLA, which requires such contributions. While the FFCRA does not require explicitly that health benefit contributions be made during Emergency Paid Sick Leave, the Department of Labor has provided guidance that health benefits are also required to be maintained during the Emergency Paid Sick Leave portion of leave. It is unclear whether other fringe benefits contributions (i.e., pension, annuity, apprentice, etc.) must be made in connection with Emergency Paid Sick Leave or Emergency Family and Medical Leave. Consideration should be given to the fringe benefit contribution language in applicable collective bargaining agreements, and specifically whether fringe benefits must be paid on hours paid or hours worked.

Prohibitions:

Employers may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Q: Does this mean the employer cannot layoff the individual because he needs to replace them?

Yes. The employer cannot lay employees off while they are on leave under the FFCRA simply because they need to replace them. There is no specific prohibition, however, on hiring temporary replacements if necessary to get work done while the employee is out.