

## MEMORANDUM

FROM: LISA & SOUSA, LTD.

TO: BUSINESS CLIENTS

DATE: MARCH 24, 2020

RE: 1) Memorandum regarding Families First Coronavirus Response Act (the “FFCRA”)  
2) Other Recommended Actions

---

The discussion below is based on the best information available as of March 24, 2020. The US Department of Labor issued a notice on *March 24* establishing an on-line method for input from the business community. The period for public comment ends on *March 29*. You can access this discussion at: <http://ffcra.ideascale.com>. Because of the extended comment period, the critical FFCRA regulations will likely be delayed.

### **1) THE FFCRA:**

The FFCRA is an economic stimulus plan aimed at addressing the impact of the COVID-19 outbreak on Americans and will be in effect from April 2, 2020 through December 31, 2020. The FFCRA includes many provisions which apply to employers, such as paid sick leave for employees impacted by COVID-19 and those serving as caregivers for individuals with COVID-19. We continue to wait for federal regulations implementing the new paid leave requirements. *Federal agencies originally had a target date of March 25, 2020 for issuing these regulations. Until the regulations issue, a clear path for employers can't be determined.*

We are monitoring all new developments closely and will provide additional information and guidance as we receive the same in order to help explain the implications of the FFCRA on employers. Please see below for our initial summary of the key benefit provisions of the FFCRA which affect employers.

There are two provisions of the FFCRA providing paid leave to employees forced to miss work because of the COVID-19 outbreak: (i) an emergency expansion of the Family Medical Leave Act (FMLA); and (ii) a new federal emergency paid sick leave law.

### **Businesses/Employers Covered by the FFCRA:**

- Every employer with less than 500 employees (a “small business”). *Whether commonly owned business entities will be coupled together to determine whether the enterprise is a “small business” required to comply with the FFCRA is unclear.* We assume this will be addressed in the new regulations.
- Hardship Exemption: The FFCRA authorizes the Secretary of Labor to issue regulations for good cause to exempt businesses with fewer than 50 employees from the requirements of paying the emergency FMLA leave and emergency sick leave when the imposition of such requirements *would jeopardize the viability of the business as a going concern.* The same issue of unknown method to determine eligibility for this exemption exists here.

**Emergency Family and Medical Leave Expansion Act (Paid FMLA leave): These are the key changes to the FMLA from passage of the FFRCA**

- Available to employees who have worked for employer for 30 days or more.
- Available if employee is unable to work (or telework) due to a need for leave to care for his or her child under the age of 18 if the school or place of care for that child has been closed, or if the child care provider of such child is unavailable, due to public emergency.
- Up to twelve (12) weeks of leave:
  - First ten (10) day period may be unpaid. During this ten (10) day period, the employee may elect to substitute any accrued paid leave (accrued vacation or sick time) to cover some or all of the ten (10) day unpaid period.
  - After the ten (10) day period:
    - Full time employees are entitled to be paid two-thirds of the employee's regular rate for the number of hours the employee would be normally scheduled with limits of \$200 per day, up to \$10,000 per employee.
    - Part time employees are entitled to be paid two-thirds of the employee's pay based on the average number of hours the employee worked for six months prior to taking the emergency FMLA.

**Federal Emergency Paid Sick Leave Act:**

- Available to all employees (regardless of how long they have worked for the employer).
- Emergency paid sick leave is available to employees if the employee is unable to work (or telework) due to the following specified purposes:
  - (1) Is under a federal, state, or local quarantine or isolation order related to COVID-19;
  - (2) Has been advised by a health care provider to self-quarantine because of COVID-19 concerns;
  - (3) Is experiencing COVID-19 symptoms and seeking a medical diagnosis;
  - (4) Is caring for an individual subject to a quarantine or isolation order or advised to self-quarantine because of COVID-19 concerns;
  - (5) Is caring for a son or daughter (as defined in by FMLA) where, due to COVID-19 precautions, the child's school or place of care has been closed; or child care provider is unavailable; or
  - (6) Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
- Amount of Paid Leave:
  - Full-time employees are entitled to 80 hours of paid leave.
  - Part-time employees are entitled to the average number of hours the employee works during a two-week period.
    - Employee's regular rate of pay if inability to work is for employee's own health condition or quarantine (enumerated as (1), (2), or (3) above). Regular rate of pay capped at \$511 per day and \$5,110 in total.
    - If leave is necessitated to care for a family member or because of a school closure

or unavailability of childcare provider (enumerated as (4), (5), or (6) above). Capped at \$200 per day and \$2,000.

- Other Requirements and Remedies:
  - Employers cannot require that employees use other available paid or unpaid leave before allowing paid leave available under this emergency provision
  - Employers cannot require that employees find a replacement to cover the employee's hours or shift before allowing paid leave.

\*\*There are tax credits available for wages paid under the FFCRA. Please contact your accountant for tax and financial advice related to these credits.

## 2) BUSINESS INTERRUPTION INSURANCE:

- Legislation is currently pending in Washington mandating insurers to provide business interruption insurance coverage for losses incurred from COVID-19.
  - Insurers are of course fighting passage of this legislation
  - Regardless of the legislation, *we recommend filing claims with your insurers for losses from COVID-19 business interruption losses.*
- All business interruption policies should be reviewed for evaluating coverage issues. *For this reason, we recommend you obtain your BI policies for review.*
- We recommend keeping thorough records documenting all business interruption losses from COVID-19.
- Filing the claim with your insurer will help to preserve the claim.
- The first lawsuit of this nature has been filed in Louisiana. The case seeks guidance on whether policy exclusions apply to COVID-19 related claims.

## 3) LEASE OBLIGATIONS:

- We recommend opening a dialogue through written requests to Landlords seeking rent relief. This can take the form of full abatement, reduction, or deferral depending on the circumstances.
- Depending on the law of your state and the terms of your lease, you may be excused from performance under the legal principle called "force majeure".
- This legal principle excuses performance when an unforeseeable and drastic event occurs that is outside of the obligated party's control, rendering its performance impossible.
- Relying on this theory to pay no rent or reduced rent has risk, given the uncertainty of how the law would be applied by a court.
- The Landlord refusing rent reduction or abatement requests puts the Landlord at risk also. If a Tenant vacates its premises, finding a replacement at this time will not be possible. Landlords will hesitate bringing eviction proceedings for fear of placing their loan covenants at risk. These factors provide measures of leverage to you.
- Every lease should be handled on a case by case basis to determine Landlord remedies, personal guaranty issues and the like.

#### **4) BANKING OBLIGATIONS:**

- Stating the obvious, dialogue should begin with your lenders seeking relief on payments while COVID-19's negative impact continues.
- Lenders are suddenly saddled with massive risk portfolios, giving them a great incentive to work with borrowers to get them through the crisis.
- At this time, loans with full or partial "interest rate swaps" are facing obstacles to modification from guaranties made to the swap "counter-party". This may change in response to continued downturns.