



**TO:** SMACNA – Western Washington Membership  
**FROM:** Julie Muller, Executive Vice President  
**RE:** Summary of the Family First Coronavirus Relief Act  
**DATE:** March 30, 2020

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In response to the COVID-19 crisis, we have been working non-stop to expand continuous updates and communications to all our SMACNA - Western Washington members. Last week, the U.S. Department of Labor's Wage and Hour Division (WHD) announced its first round of published guidance to provide information to employees and employers about how each will be able to take advantage of the protections and relief offered by the **Families First Coronavirus Response Act (FFCRA)** when it takes effect on April 1, 2020. The guidance in the Questions and Answers (Q&A) addresses critical questions, such as how an employer must count the number of their employees to determine coverage; how to count hours for part-time employees; how to calculate the wages employees are entitled to under this law; and how small businesses can obtain an exemption.

As noted in the Q&A, there are still key questions that need to be answered by outside counsel, SMACNA, and/or further Department of Labor (DOL) guidance. We will supplement this memorandum as more information becomes available. If you have any questions or concerns, please do not hesitate to reach out to Julie Muller at [jmuller@smacnaww.org](mailto:jmuller@smacnaww.org) or at (714) 889-9472 for more information.

**When Does The FFCRA Take Effect?** April 1, 2020

**Who Does The FFCRA Apply To?** Employers with fewer than 500 employees

**What Benefits Does The Act Confer?** The Act expands the Family Medical Leave Act (FMLA) and adds Emergency Paid Sick Leave (sick leave) as follows:

- **FMLA:** temporarily expands FMLA-protected leave up to 12 weeks when an employee is unable to work or telecommute due to the care for a son or daughter under the age of 18 because of a school or childcare center closure, or the child's usual care provider is unavailable due to COVID-19. All other existing provisions of FMLA remain in effect.
- **Sick Leave:** requires 80 hours of paid sick leave for full-time employees or the equivalent of two weeks for part-time employees when the employee is unable to work or telecommute and:
  - (1) is subject to 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 due to concerns related to COVID-19;
- (3) is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in subparagraph (2);
- (5) is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; 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.

**Does Governor Inslee’s “Stay at Home, Stay Healthy” Executive Order Constitute A “Quarantine” or “Isolation” Order?** This is important because an employee may take sick leave under the FFCRA if he or she is “subject to a Federal, State or local quarantine or isolation order related to COVID-19.” We believe that current law supports that the Governor’s order does not constitute a quarantine or isolation order. Past CDC guidance on isolations and quarantine orders indicate that a stay at home or shelter in place order does not equate to an isolation or quarantine order. But, we caution that the law is evolving, and federal or state authorities may find otherwise. A “quarantine” is defined by the CDC as separating and restricting movement of people who were exposed to a contagious disease to see if they become sick. “Isolation” is defined by the CDC as separating sick people with a contagious disease from people who are not sick. DOL could issue guidance finding otherwise, especially given Congress’ intent with the FFCRA to provide employees with unprecedented levels of help during the COVID-19 pandemic.

**What Employees Do These Benefits Apply To?** For FMLA, any employee who has been with the employer for at least 30 days. For sick leave, all employees regardless of duration of employment.

#### **What Is The Pay Rate For FMLA and Sick Leave?**

- FMLA: the first 10 days of the leave is unpaid, though employees can choose (not be required) to use other accrued, unused paid leave during this 10-day period, such as PTO. If they choose not to use available paid leave, the first 10 days of FMLA leave is unpaid. The remaining period is paid at the lesser of \$200 per day or two-thirds of the employee’s regular rate of pay. Benefits are capped at a total of \$10,000 per employee (*i.e.*, 10 weeks at \$200/day). As stated above, all existing FMLA provisions remain in effect so you must continue to make health care contributions on behalf of the employee to maintain group health insurance while he or she is on FMLA leave.
- Sick Leave: If the sick leave is taken for an employee’s own care, it should be paid at the employee’s regular rate of pay, up to a maximum of \$511/day or \$5,110 total. If leave is taken for another person’s care, it should be paid at two-thirds of the employee’s regular rate of pay, up to a maximum of \$200/day or \$2,000 total.

**What is “Regular Rate of Pay”?** Under DOL guidance:

- The regular rate of pay used to calculate an employee’s paid leave is the average of the employee’s regular rate over a period of up to six months prior to the date on which he or she takes leave. If the

employee has not worked for the current employer for six months, the regular rate used to calculate the employee's paid leave is the average of his or her regular rate of pay for each week worked for the current employer. We believe the "regular rate of pay" for Local 26 and Local 32 employees is based on the "taxable wage" (*i.e.*, base rate plus vacation/leave contribution).

- You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

**Can Employees Be Required to Exhaust Accrued, Unused Time Off First?** No

**Can Employers Receive a Tax Credit For Payment of Leave?** Yes. Employers may claim a quarterly payroll tax credit for 100 percent of the amounts paid out under both the sick leave and FMLA provisions. Unfortunately, the payroll tax credit may be insufficient compared to the benefit paid.

**How Does FMLA and Sick Leave Apply To Employers Under Multiemployer Bargaining Relationships?** FFCRA provides that employers with a multiemployer bargaining relationship, may - consistent with the terms of the CBA - fulfill their obligation under the law based on the paid leave each that its [bargaining unit] employees are entitled to under the law - and that those employees may receive mandated pay from the multiemployer fund or plan provided for that purpose under the CBA.

**Must Employers Provide FMLA or Sick Leave Prior To Laying Off An Employee?** We think it is unlikely because, under the Fair Labor Standards Act, a laid off employee is not a "covered employee" and the FFCRA uses the FLSA's definition of employee. *Note: we are awaiting further clarification on this issue from our outside counsel, SMACNA and/or further DOL guidance.*

**What About Employers With Less Than 50 Employees?** DOL issued guidance that these employers do not need to provide sick leave if such leave is requested to take care of a child whose school or childcare center is closed because of COVID-19 if the employer can show that providing such leave would "jeopardize the viability of the business as a going concern." Such employers do not need to formally request a waiver from DOL. Rather, they need to document internally that they meet the DOL criteria which will be provided in further DOL guidance.

**Is There a Grace-Period For DOL Enforcement?** DOL states that there will be a temporary period of non-enforcement for the first 30 days after the FFCRA takes effect as long as the employer has acted in good faith to comply with the law.

**Must I provide Notice Of Leave Entitlement To Employees?**

Yes. DOL has just published a model notice which can be found here:

[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf).

*The above is intended to be informational and should not be construed as legal advice. If you have questions about a specific situation, we strongly encourage you to contact your labor and employment counsel.*