FCA International: New FFCRA Law

Frequently Asked Questions – What Contractors Need to Know

Employers Subject to Collective Bargaining Agreements

Does the FFCRA Apply to Employers with a CBA?

Yes, as noted above, the law would apply to ***all*** businesses with ***fewer than 500 employees***, including those who have a CBA.

In fact, the law specifically provides that employers who are signatory to a multiemployer CBA are permitted to satisfy their paid leave obligations under the FFCRA by making contributions to a multiemployer fund, plan or program. The law makes clear, however, that employees must be able to receive payment from the fund, plan or program for any paid leave that would have otherwise been paid by their employer.

By specifically providing an alternative method of compliance, the law appears to assume that employers subject to a CBA will be covered, provided that they employ fewer than 500 employees.

Do I have to pay "fringes" (health insurance, pension, etc.) on the payments I make to union employees taking Emergency FMLA or Emergency PSL?

Likely no. The payments under both the Emergency FMLA and the Emergency PSL are tied to the definition of ***"regular rate of pay"*** under the FLSA (29 U.S.C. § 207(e)). Remember, too, that the amounts are capped per the amounts discussed above.

Under the FLSA, the definition of ***"regular rate"*** ***excludes*** several amounts, including: ***"contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees."*** 29 U.S.C. § 207(e)(4). Thus, any payments to employees pursuant to the provisions of the FFCRA would, by definition, **exclude** amounts payable to a pension plan or health and welfare plan.

The Union may claim that the CBA requires payment of fringes on amounts paid pursuant to the FFCRA. While the strength of this argument would likely depend on the text of your CBA, it would be very difficult for the Union to claim that the amounts paid under the FFCRA were contemplated by the parties at the time they negotiated the CBA and, somehow, intended that these amounts be paid to the fund.

Are there any other steps that a unionized business must take?

Remember, if you have a current CBA, you'll need to give the union notice and an opportunity to bargain before implementing any changes that affect employees' terms and conditions of employment.

However, we recommend having a plan in place for complying with the FFCRA requirements before agreeing to meet with the Union. If the Union reaches out, let them know that you are reviewing the law with labor counsel and will be in contact soon.

Layoffs, Closures, and Other Issues If a jobsite is closed and everyone is laid off, would I still have to provide paid leave?

This is a difficult question and, in the absence of regulatory guidance from the DOL, we can only provide general guidance. Each situation is different, and you should seek legal advice before making any decision. Indeed, in addition to your potential obligations under the FFCRA, you may have obligations under ***other*** state and federal laws, such as the WARN Act, the FLSA, ERISA, and COBRA.

As an initial matter, employees whose employment is terminated (or employees who are laid off because of lack of work) **before** April 1, 2020, would likely ***not*** be eligible for Emergency PSL or Emergency FMLA. This is because they do not need "leave" for a job that does not exist. The text of the FFCRA appears to assume that (i) work is available and (ii) that the employee is "unable to work (or telework)" because of a qualifying reason.

As a result, if there is no work for the employee to perform (because of layoff or termination), there should be no Emergency PSL or Emergency FMLA obligation. The employee would, of course, likely be eligible for unemployment pursuant to the state unemployment statute.

A more difficult question is posed by a situation where an employer decides to close a jobsite (and lay off everyone) ***on or after*** April 1, 2020. Akin to the example above, the absence or inability of the employee to work is ***not*** effectuated by an employee's "need for leave" as defined by the FFCRA but rather by the lack of work available (because the employer has closed or the jobsite is closed). Thus, it is likely that Emergency PSL and Emergency FMLA are not available in this circumstance.

This analysis is buttressed by the fact that employees are typically not allowed to use paid sick leave or PTO for times when they are not scheduled to work. Likewise, the FMLA (at least before it was amended) made clear that an employee on leave is entitled to no greater protection from a layoff as any other employee. See 29 C.F.R. § 825.216(a)(1).

Thus, an employee on a job-protected FMLA leave (e.g., birth of a child or "serious health condition") was not protected from termination if the employer made a non-discriminatory decision to conduct a layoff or reduction in force that happened to affect the employee on FMLA. It remains to be seen whether the FFCRA changed this standard, and we will likely need additional regulatory guidance from the DOL before we have a definitive answer.

As you can see, this issue is a difficult one and, given the questions surrounding the new law, it is best to get legal advice regarding your obligations.

Tax Credits and Employers with Cash-Flow Issues

How does my company get reimbursed by the IRS?

As to Emergency FMLA, the FFRCA provides that "there shall be allowed as a credit against the tax imposed by section 3111(a) of the Internal Revenue Code of 1986 for each calendar quarter an

amount equal to ***100 percent of the qualified family leave wages*** paid by such employer with respect to such calendar quarter."

There is a cap on the employer's tax credit for each employee's paid Emergency FMLA: $200 per employee per day and $10,000 total per employee. As noted above, this aligns with the maximum payout to employees who use Emergency FMLA.

With respect to Emergency PSL, the FFRCA provides that "there shall be allowed as a credit against the tax imposed by section 3111(a) of the Internal Revenue Code of 1986 for each calendar quarter an amount equal to ***100 percent of the qualified sick leave wages*** paid by such employer with respect to such calendar quarter."

There are, however, caps on the employer's tax credit:

- $511 per day ($5,110 in the aggregate) if the leave is taken for an employee's own illness or quarantine, and
- $200 per day ($2,000 in the aggregate) if the leave is taken for the care for others or school closures.

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