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[Employer Alert: FFCRA Amnesty, the CARES Act Paycheck Protection Program, and the Small Business Viability Exemption Provide Options for Employers](#)

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Over the past few days, employers have received options beyond terminating employees (RIFs, layoffs, furloughs, temporary terminations, etc.) in response to COVID-19 and leave concerns.

Amnesty for Employers under FFCRA

For employers with cash flow concerns, the Department of Labor, Wage and Hour Division, has already implemented an amnesty program to assist in alleviating the disruption of an immediate run on Emergency Paid Leave.

“If employees got money for limping, everyone would walk with a limp.”

As a brief recap, the FFCRA generally provides employees up to 80 hours of paid leave totaling up to \$2,000 or \$5,110 under the Emergency Paid Sick Leave Act (EPSLA), and up to 12 weeks and up to \$10,000 of paid leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA). These are both referred to as Emergency Paid Leave. As discussed in our webinars, we have been receiving preliminary indications that numerous employees are planning to take advantage of the Emergency Paid Leave in the first two weeks of April 2020.

In an internal memorandum from its Wage and Hour Division, [the DOL Field Assistance Bulletin No 2020-1](#) discusses the **non-enforcement** of the FFCRA for the period of March 18 through April 17, 2020.

The DOL will not enforce FFCRA violations through April 17, 2020, if an employer makes reasonable, good faith efforts to comply. These efforts include three (3) prongs:

1. The employer remedies violations “as soon as practicable.”
2. The violations were not willful.
3. The employer agrees to comply in the future.

The key is “as soon as practicable.” The DOL elaborates that “For purposes of this non-enforcement policy, employers who are eligible for tax credits but who have insufficient cash flow should make payment of sick leave or family leave wages as soon as possible, but not later than seven 7 calendar days after the employer has withdrawn an amount equal to the required paid sick leave and expanded family and medical leave wages from the employer’s Federal

payroll tax deposits or, to the extent such deposits are not sufficient, has received a refund of the credit amount from the IRS to cover the required wages.”

What does this mean for employers?

This eliminates the major headache facing cash-poor employers of having to pay for Emergency Paid Leave on an initial rush of use by employees. Those employers can essentially wait until they have the cash available through credits and refunds before paying for Emergency Paid Leave used by employees from April 1 to April 17.

CARES Act – Paycheck Protection Program

The Paycheck Protection Program of the CARES Act provides up to \$349B to help keep small businesses operating and keep their workers employed. The terms are complex, and a much more detailed analysis is on the [BMD Resources](#) page, including a comprehensive recap. The general highlights for employers are as follows:

- Small businesses and nonprofits with fewer than 500 employees are generally eligible (as are the self-employed)
- Loans up to 2.5 times the average monthly payroll costs over the trailing twelve months preceding the loan, up to \$10M
 - Payroll costs include: wages, tips, vacation, family leave and sick pay, severance comp, group health care contributions, payment of retirement benefits, and state and local tax payments.
 - Payroll costs exclude: compensation of individuals in excess of \$100,000 (calculated on a prorated basis), taxes withheld or paid for income tax or FICA, and paid sick leave or paid family medical leave under FFCRA.
- No personal guarantees, no collateral, no recourse
- Loans are 100% guaranteed by SBA
- Loan forgiveness equal to the amount spent on payroll (up to monthly comp of \$8,333.33 per employee), rent, mortgage interest, and utilities for the first eight (8) weeks from the date of loan origination.
 - Forgiveness is reduced in proportion to a reduction in workforce or a reduction in employee pay over 25%
- To encourage rehiring, provisions are retroactive to February 15, 2020 and cover loans to June 30, 2020.
- Simplified terms on loans:
 - 10-year maturity period from date of loan forgiveness (to the extent not completely forgiven)
 - Not greater than 4% interest
 - All borrowers are deemed as having been impacted by the COVID-19 and include automatic deferment from 6 months to 1 year.
 - No collateral required
 - No penalty for prepayment

What does this mean for employers?

The “loan” is actually more of a “grant” for the strategic employer. Granted, this is a brief evaluation, but some employers may obtain forgiveness of the entire loan. Employers can even

implement pay reductions of up to 25% while still maintaining the benefits of the loan forgiveness. An employer will not be penalized for employees terminated between February 15, 2020 to April 26, 2020, if the employee is rehired by June 30, 2020. This allows employers to implement short-term measures and revisit them later to maximize the loan incentives.

Viability Exemptions for Employers with Fewer than 50 Employees

The Viability Exemptions are broad. Employers, including religious or nonprofits, with fewer than 50 employees are exempt from providing either or both Emergency Paid Leave and Emergency Childcare Leave to employees if it would jeopardize the viability of the small business.

To claim the exemption, an authorized officer of the business must determine one of the following:

1. That granting the Emergency Paid Leave would result in expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity;
2. The absence of an employee or all employees **requesting** Emergency Paid Leave would be a substantial risk to the financial health or operational capabilities of the 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 same work of the employee or employees **requesting** Emergency Paid Leave, and the provision of that work is necessary for the small business to operate at a minimal capacity.

What does this mean for small employers?

It means that an authorized officer (undefined term) should be involved in the decision to grant or deny Emergency Paid Leave. These employers can deny Emergency Paid Leave requests to one, some, or all of the employees, depending upon the business justification at the time the request was made.

Caution: Just because you can deny a request for operational reasons does not mean that you should deny all requests. Some employees will have legitimate COVID-19 illnesses or exposures. Denying Emergency Paid Leave to those employees and having them show up to work may result in the spread throughout the entire workforce.

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