



# FEDERAL COVID-19 RESPONSE: WHAT EMPLOYERS NEED TO KNOW

Bryant S. Banes

Managing Shareholder

Neel, Hooper & Banes, P.C.

[www.nhblaw.com](http://www.nhblaw.com)

[bbanes@nhblaw.com](mailto:bbanes@nhblaw.com)

713-629-1800

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# Neel, Hooper & Banes, P.C.

## ABOUT US:

Neel, Hooper & Banes is a boutique law firm in Houston, Texas, that serves businesses throughout the nation. We provide employer-side counsel and legal representation for all facets of Labor & Employment law and legal services for Government Contractors with state and federal government contracts.

Don't worry about the dog.



I'll keep him under control!



# TOPICS

- Families First Coronavirus Response Act (FFCRA)
  - Emergency Family and Medical Leave Act (FMLA) Expansion
  - Emergency Paid Sick Leave
  - Tax Credits for Paid Leave
- Coronavirus Aid, Relief and Economic Security Act (CARES)
  - Paycheck Protection Program
  - Pandemic Unemployment Compensation Benefits
- Issues for Federal Contractors / Critical Infrastructure Employers
  - Leave Exemptions for Medical/First Responders
  - Contractor Claims for COVID-19 Changes (DPA)
- Questions & Answers

# Phase II Legislation

- Families First Coronavirus Response Act (FFCRA)
- Effective Dates: April 1, 2020 – December 31, 2020
- Pending Regulations May Clarify – <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>



## General Question

- *Can you ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?*
  - Yes, you are permitted to ask them to seek medical attention and get tested for COVID-19.
  - CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace.
  - EEOC confirmed that advising workers to go home is permissible and not considered disability-related if they have symptoms of COVID-19 or the flu



## Emergency FMLA Expansion

- **Covered Employers:** Employers with fewer than 500 employees, however, the Secretary of Labor has authority to exempt small businesses with fewer than 50 employees when compliance with the leave requirements would jeopardize the viability of the business.
- **Eligible Employees:** Employees who have been employed with the company for at least 30 calendar days.



# Emergency FMLA Expansion

- **Emergency Leave:** Employers must provide up to 12 weeks of job-protected FMLA leave to employees for “a qualifying need related to a public health emergency.” “Qualifying need” is limited to circumstances where an employee:
  - Is unable to work (or telework) due to a need to care for a minor child if the child’s school or child care has been closed; or
  - Is unavailable due to a public health emergency.



# Emergency FMLA Expansion

- **Pay:** The first 10 days of Emergency FMLA leave may be unpaid. After the first 10 days of unpaid leave, the remaining time must be paid at 2/3 the employee's regular rate. For hourly employees, the regular rate is calculated based on the number of hours the employee would normally be scheduled to work. Paid leave is capped at \$200 per day and \$10,000 in the aggregate.
- **Restoration to Position:** The bill prohibits terminating an employee who takes leave under the Act. However, the bill includes an exception for employers with less than 25 employees, if the employee's position no longer exists following leave due to operational changes caused by a public health emergency.



# Emergency Paid Sick Leave

- **Covered Employers:** Employers with fewer than 500 employees, however, the Secretary of Labor has authority to exempt small businesses with fewer than 50 employees when compliance with the leave requirements would jeopardize the viability of the business.
- **Eligible Employees:** All employees, regardless of when they started working for the company.
- **Prohibitions:** The bill prohibits retaliating against any employee who takes leave in accordance with the new law. The bill also prohibits requiring an employee to take other employee provided sick leave before using the sick leave provided under the Act. Failure to pay required sick leave will be treated as a failure to pay minimum wages in violation of the Fair Labor Standards Act.



# Emergency Paid Sick Leave

- **Sick Leave:** Employers must provide employees with up to 80 hours of paid sick leave (or the equivalent of two weeks of hours for part-time employees). This leave is available if:
  - 1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  - 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  - 3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  - 4. The employee is caring for an individual who is ordered to quarantine or self-isolate;
  - 5. The employee is caring for a son or daughter whose school or child care has been closed, or is unavailable, due to COVID-19 precautions; or
  - 6. The employee 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.
- **Pay:** Paid sick leave must be provided at the employee's regular rate of pay. Sick leave is capped at \$511 per day (\$5,110 in the aggregate) where it is taken for reasons (1), (2), and (3) above (an employee's own illness or quarantine); and \$200 per day (\$2,000 in the aggregate) where it is taken for reasons (4), (5), or (6) (care for others or school closures).



# Tax Credits for Paid Leave

- Employers are reimbursed for paying the required leave through tax credits. The bill provides refundable tax credits for employers equal to 100 percent of qualified family leave and/or sick leave wages required to be paid by the bill. The tax credit is allowed against the tax imposed by section 3111(a) (the employer portion of Social Security taxes) or Section 3221(a) (employer excise tax). The tax credits are capped as follows:
  - The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 per calendar quarter.
  - The amount of qualified sick leave wages taken into account for each employee is capped at \$200 per day the employee takes qualified sick leave (or \$511 if sick leave is taken for the reason described in paragraphs (1), (2), or (3) (i.e. an employee's own illness)).
- Childcare leave and paid sick leave credits will also be increased to include amounts employers pay for the employee's health plan coverage while they are on leave.





# Phase III Legislation

- **Coronavirus Aid, Relief and Economic Security Act (CARES Act)**
  - Paycheck Protection Program
  - Pandemic Unemployment Compensation Benefits
  - Critical Infrastructure and Federal Contractors



# Paycheck Protection Program

- The Paycheck Protection Program (“PPP”) expands the SBA’s 7(a) Loan Program and is in addition to the “up to \$10K” advance and EDIL loans available through the SBA.
  - Ten year loans, 4% interest, no prepayment penalty, with 6-12 months deferral of principal and interest
  - Loans are available with no personal guarantee, no collateral, and no proof that funds can be obtained elsewhere
  - Administered by Banks
  
- For Full Application and Instructions, see: <https://covid19relief.sba.gov/#/> & <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>
  
- What is the covered period?
  - February 15, 2020 through June 30, 2020.
  
- To whom does the PPP apply?
  - Businesses in operation on February 15, 2020 with fewer than 500 employees shall be eligible to receive a loan made under section 7(a) of the Small Business Act, 15 U.S.C. 636(a), in addition to small business concerns.
  - The PPP also includes nonprofits, veteran organizations, Tribal businesses, sole-proprietors, independent contractors, and certain self-employed individuals.
  - Businesses in the hospitality industry are eligible for a loan as long as they do not employ more than 500 employees per physical location.



# Paycheck Protection Program

- How much can a qualifying business be loaned?
- The maximum amount of the loan shall be the lesser of –
  - Average monthly payroll costs times 2.5 plus any Economic Injury Disaster Loans (“EIDL”) received after January 31, 2020 that are refinanced under section 36, not to exceed \$10,000,000.
- Payroll costs -
  - DO include all employee compensation and group health benefit costs
  - DO NOT include employee compensation in excess of \$100K per year, taxes withheld, to nonresidents, for those allowed FLMA and sick leave credits under the FFCRA



# Paycheck Protection Program

- Loan Forgiveness:
  - A borrower is eligible for forgiveness in an amount equal to the amount actually paid for payroll costs, salaries, benefits, rent, utilities, and mortgage interest during the 8 weeks following the disbursement of the loan. Additional wages paid to tipped employees may also be forgiven.
  - If employees are laid off or have their pay reduced in excess of 25%, loan forgiveness is reduced proportionally
  - The SBA will issue guidance and regulations implementing this section within 30 days of the date of enactment of the CARES Act.
  - CAVEAT 1: Loan forgiveness is not automatic, so watch for implementing regulations and deadlines!!!
  - CAVEAT 2: Loan forgiveness generally obviates eligibility for payroll tax credit and deferral in the CARES Act



# Pandemic Unemployment Compensation

- DOL will provide unemployment benefits to self-employed, persons seeking part time employment, persons without sufficient work history to obtain benefits under state, persons who otherwise do not qualify for benefits under either state law or the Pandemic Emergency Unemployment Compensation program, and persons who have exhausted their entitlements to such benefits.
- Benefits will be through 12/31/2020. (NOTE: This is in addition to the UI for those previously eligible, which is augmented by a \$600 per week increase through July 31, 2020 and 13 extra weeks through December 31, 2020)
- Claimant must self-certify that s/he is able to work, but cannot due to 1 of the following 11 reasons:
  - (1) having COVID-19 or experiencing COVID-19 symptoms and seeking a diagnosis; or
  - (2) a member of the worker's household being diagnosed with COVID-19; or
  - (3) caring for a family member or household member who has been diagnosed with COVID-19; or
  - (4) a child or other household member for whom the worker is a primary caregiver being unable to attend school because of a COVID-19 closure; or
  - (5) workplace closure due to a COVID-19 quarantine; or
  - (6) a medical recommendation to self-quarantine due to COVID-19 concerns; or
  - (7) being scheduled to commence employment with a new employer but losing that job or being unable to reach it due to COVID-19; or
  - (8) becoming the "breadwinner or major support" for a household after the head of the household dies due to COVID-19; or
  - (9) quitting a job "as a direct result of COVID 19"; or
  - (10) the place of employment closing due to COVID-19; or
  - (11) meeting any additional criteria the U.S. Department of Labor establishes for unemployment assistance
- Persons not eligible include: (1) individuals who can telework with pay and (2) individuals who are receiving paid sick leave or other paid leave benefits.

# Critical Infrastructure and Federal Contractors

- “Critical Infrastructure” (<https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>) is Still Working
  - Recommend Written COVID-19 Mitigation Plan (OSHA)
  - See President’s “Coronavirus Guidelines:” [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf)
- Medical Professionals and First Responder Exemption from Leave Provisions
- The Defense Production Act (e.g., Michigan Car Manufacturers)
  - What is a “Rated Order?”
- Federal Contract Changes
  - Funds may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum contract billing rates, not to exceed an average of 40 hours per week, any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but not beyond September 30, 2020.
  - Maximum reimbursement reduced by tax credits for paid sick leave and any applicable credits a contractor is allowed under the CARES Act.



## Contact

# Bryant S. Banes

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