

Supplemental FAQs re Federal Covid-19 Legislation

March 31, 2020

Based on questions we have received from clients, here are some supplemental questions and answers re: The Families First Coronavirus Response Act (“FFCRA”) and Coronavirus Aid, Relief, and Economic Securities Act (“CARES Act”).

Does the California shelter-in-place order qualify as “quarantine or isolation order” under the FFCRA?

This remains an open question. By its terms, the Governor’s shelter-in-place order appears to qualify, as it requires isolation related to COVID-19. However, federal regulations construe the terms narrowly. For instance, “isolation” means “the separation of an individual or group who is reasonably believed to be infected with a quarantinable communicable disease from those who are healthy to prevent the spread of the quarantinable communicable disease.” Under this definition, the shelter-in-place order would not appear to qualify.

The Department of Labor (“DOL”) has also signaled an intent to construe the language narrowly. The FAQs posted on the DOL website state that employees do not qualify for sick leave or expanded family and medical leave under the FFCRA if the employee’s worksite closed prior to the FFCRA’s effective date, “whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.” We will keep you updated on any further guidance.

Who qualifies as a health care provider under the FFCRA?

The DOL guidance defines health care worker differently depending on the situation.

Health care workers *whose advice to self-quarantine* for COVID-19-related concerns will provide a qualifying reason for paid emergency sick leave include a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for FMLA purposes. FMLA regulations adopt a broad definition of potential health care providers who can issue such certifications, including podiatrists, dentists, clinical psychologists, optometrists, certain chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, Christian Scientist practitioners, and any other health care provider from whom an employer or employer’s health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.

Health care providers **who employers may exclude** from paid sick leave and/or expanded family and medical leave includes anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.

Do rehired employees qualify for FFCRA leave?

The CARES Act added a provision making rehired employees eligible for FFCRA leave. Such employees will be considered employed for at least 30 calendar days, and therefore eligible for leave under FFCRA, if they were (1) laid off by the employer on March 1, 2020 or later; (2) had worked for the employer for at least 30 of the last 60 calendar days prior to the employee's layoff; and (3) were rehired by the employer thereafter.

Are unions eligible for the Small Business Administration loan and loan forgiveness program under the CARES Act?

Generally, no. The expanded SBA program in the CARES Act is limited to certain Internal Revenue Code 501(c)(3) (charitable) and 501(c)(19) (veteran) organizations, but not to other 501(c) organizations, such as unions organized under 501(c)(5). There are other programs that unions can take advantage of, as discussed in a recent Altshuler Berzon LLP update.

Are unions eligible under the SBA's Economic Injury Disaster Loan Program?

It appears that the answer is yes. This program applies to "private nonprofit organizations," which is not defined but seems to include 501(c)(5) organizations.

These loans may be used to pay fixed debts, payroll, accounts payable, and other bills that can't be paid because of the disaster's impact. The interest rate for non-profits is 2.75%. The loan amount is capped at either the actual amount of economic injury to an organization or \$2 million, whichever is lower. Organizations can apply for an emergency advance of up to \$10,000, available within three days of the submission of a successful application, which does not have to be repaid.

This program is further discussed in a recent Altshuler Berzon LLP update.

Are unions eligible for an employee-retention credit?

Yes, under certain circumstances. Nonprofits organized under 501(c)—including 501(c)(5)—may be eligible if (1) business operations have been fully or partially suspended due to a governmental shutdown order due to COVID-19; **or** (2) gross receipts declined by more than 50% when compared to the same quarter in the previous year.

Eligible employers will receive a credit against their share of Social Security payroll taxes equal to 50% of the qualified wages and health care contributions for each quarter. The amount of qualified wages is capped at \$10,000 per calendar quarter, meaning that the credit can be up to \$5,000 in tax credits.

The nature of the credit depends on the size of the employer. For employers with 100 or fewer full-time employees, all employee wages qualify for the credit. For employers with greater than 100 employees, only employees who are not providing services to the employer because of COVID-19 (either because the employer is required to fully or partially suspend its business or because the employer has experienced a significant decline in gross receipts) are eligible.

This program is further discussed in a recent Altshuler Berzon LLP update.

Are unions eligible for the payroll tax deferral?

Yes. The payroll tax deferral is available to employers not participating in the SBA loans (for which 501(c)(5) unions are ineligible). The payroll tax deferral permits eligible employers to defer payment of the 6.2% employer's Social Security payroll tax and 1.45% Medicare tax during the remainder of 2020. Employers have two years to pay the deferred payroll taxes: half by December 31, 2021 and the second half by December 31, 2022.

What if I have other questions?

The Department of Labor has a helpful FAQ page [here](#) that covers the basics of the law. We are also available to discuss any questions you have about the FFCRA. You may reach out to your regular contact at Altshuler Berzon LLP with questions, or if you are uncertain whom to contact, please email Stacey Leyton at sleyton@altber.com.

In Solidarity,

Altshuler Berzon LLP