

Labor & Employment Alert

Update on the Coronavirus and the Pennsylvania Public Employer —Federal and State Action

This week has seen a dramatic increase in coronavirus cases (COVID-19) in Pennsylvania and the surrounding states. In addition, a flurry of action at the federal and state level has occurred which will impact public employers within the Commonwealth. On Wednesday, March 18, 2020, the United States Senate passed the Families First Coronavirus Response Act (FFCRA) which made changes to the Family and Medical Leave Act (FMLA) and provided paid sick leave benefits in certain circumstances. Second, on Thursday, March 19, 2020, Pennsylvania Governor Wolf issued an Order directing all non “life sustaining businesses” in Pennsylvania to close physical locations by 8 p.m. on March 19. These two separate actions may impact public employers in different ways. Below are some frequently asked questions on each topic:

FAMILY FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

1. **Does the FFCRA apply to public employers?** Generally, yes. Potential exemptions exist within the legislation, but to become effective, the Department of Labor would have to outline the exemptions through regulation, which has not occurred at this time. In addition, the legislation allows employers to exempt emergency responders, which would presumably exclude police and paid fire employees.
2. **How Does the FFCRA Change Current Law?** The FFCRA makes changes to the Family and Medical Leave Act and separately provides paid leave time in certain circumstances.
3. **What if the public employer has less than 50 employees?** Under the Family and Medical Leave Act (“FMLA”), an employee typically needs to be employed for 1,250 hours in the past twelve months and also must be in a workforce with 50 or more employees in order to claim leave entitlement. The FFCRA creates a narrow additional benefit under the FMLA solely for employees who have worked for an employer with **less than** 500 employees (no minimum number) and who has been employed by that employer for at least 30 days.
4. **What benefits are employees entitled to under the FFCRA?** Under the FFCRA an employee who meets the above requirements is entitled to leave when the employee is “unable to work (or telework) due to the need for leave to care for” a child “if the school or place of care” has closed or the “child care provider” has become “unavailable” due to a public health emergency. “Public health emergency” is defined under the FFCRA to cover only declared emergencies relating to COVID-19. Also, “child care provider” covers only an individual who “receives compensation” for doing so “on a regular basis.” Schools included are only elementary and secondary schools.
5. **How Much Leave Time can an Employee Receive under the FFCRA?** The first ten days of the above leave are unpaid. The remaining time (hypothetically, the lesser of the remainder of the time in which the coronavirus impacts an employee in the above way or twelve weeks), the employee is entitled to paid leave (payable at 2/3 of the employee’s regular rate of pay for all hours which the employee would have worked, with a maximum daily amount of \$200 and a maximum total amount for the employee of \$10,000).

6. ***If One of Our Employees Already Utilized All of Their Pre-FFCRA FMLA Time, do They Still Get the FFCRA Time?*** No, if an employee used all of their Pre-FFCRA FMLA Time, the employee would not receive more. If the employee used part of the time, the employee might be entitled to a portion of the FFCRA time.
7. ***What Other Benefits are Provided Under the FFCRA?*** In addition to the change in the FMLA, the FFCRA also affords employees up to 80 hours of paid leave time. The time can only be for one of the following circumstances: (1) is subject to a government quarantine order; (2) has been advised by “a health care provider” to quarantine; (3) has COVID-19 symptoms and is seeking a diagnosis; (4) is caring for someone who either has been advised by a doctor to quarantine or for someone who has COVID-19 symptoms; (5) is caring for a child who needs care because of a school or paid day closing due to COVID-19; or (6) has any other substantially similar condition as specified by the federal government.
8. ***Is There a Maximum Daily Rate for the Paid Leave Time?*** Yes, \$511 per day and \$5,110 total for the period of leave.
9. ***Are the Exemptions for Paid Leave the Same as the FMLA Exemptions?*** Yes, the same exemptions exist for emergency responders that would likely include police and firefighters.
10. ***We Already Provide Paid Leave Time to our Employees, Does This Apply to Us?*** Yes, the paid leave time under the FFCRA does not run concurrent with any other paid leave time.
11. ***Are These Changes Permanent?*** No, these changes take effect on April 2, 2020. They will end when the COVID-19 Pandemic subsides.

GOVERNOR WOLF’S MARCH 19, 2020 ORDER

1. ***What Does the Governor’s Order Accomplish?*** The Governor’s Order directed all non “life sustaining businesses” in Pennsylvania to close physical locations by 8 p.m. on March 19.
2. ***Does the Governor’s Order Impact Public Employers?*** The terms of the Order did not appear to restrict or impact public employers. In addition to the Order, the Governor provided a grid of employer’s who were considered “life sustaining businesses.” These businesses consist of private sector businesses and some non-profit organizations grouped by the type of area/service in which they are involved. The Order indicated that, in addition to the Pennsylvania State Police, local authorities are tasked with enforcing the provisions of the Order.
3. ***Will the Governor’s Order Impact Public Employers?*** Possibly, yes. Although the Order does not require public employers to cease operations, public employers may be impacted because other businesses which serve them may be forced to discontinue operations. Therefore, some of your vendors may not be available to serve your public employer. In addition, some of the groups with which some of your public employers interact may be shuttered. For instance, your Codes Department may have even lower demand because of a lack of activity by builders.
4. ***If We Maintain Operations, are There any Restrictions?*** Yes, businesses which are not subject to the Order still must maintain social distancing and any other mitigation steps outlined and approved by the Centers for Disease Control.
5. ***How Long Does the Governor’s Order Remain in Effect?*** Based upon the text of the Order, it remains in effect until further notice.

If you have any questions about the federal or state action, you should contact your solicitor or your labor counsel.