

Families First Coronavirus Response Act (FFCRA): FMLA Expansion & Federal Paid Sick Leave

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Patrick Moody of Barsamian & Moody in Fresno has achieved Martindale-Hubbell's highest attorney rating of AV. Mr. Moody has over 25 years of experience providing employers with practical solutions and advice for complying with the full range of statutes and regulations relating to labor and employment law. He has successfully tried numerous cases in both state and federal trial and appellate courts, before most state and federal administrative agencies, and in labor grievance arbitrations. That litigation experience includes representing employers facing major class actions alleging cutting-edge issues in harassment, discrimination and wage and hour claims. Mr. Moody also advises clients on ways to remain union-free, as well as successfully defeating union organizing campaigns.

Mr. Moody earned his undergraduate degree from the University of Florida, and his J.D. degree, with honors, from the California Western School of Law, where he was on the Executive Board of the California Western Law Review and the California Western International Law Journal. He was admitted to the California State Bar in 1991 and is also admitted to practice before all federal courts in California, and the Ninth Circuit Court of Appeal.

Mr. Moody is a featured speaker for numerous organizations, including the Agricultural Personnel Management Association, the Fresno County Employer Advisory Council, and others. He is the author of several regularly published columns on topics relevant to employers, and also contributes articles to a wide variety of publications directed to employers.

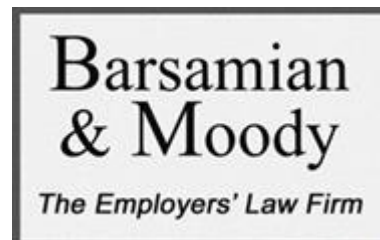


Disclaimer

We wish to express confidence in the information contained here. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which commonly give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

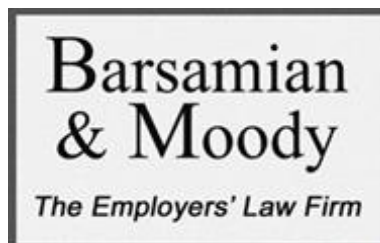
The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.

Please note that this area is rapidly evolving. Check with Barsamian & Moody or other experienced labor counsel for the most up to date information relevant to your questions.



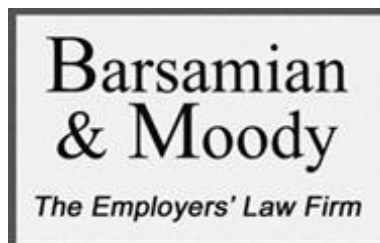
Families First Coronavirus Response (FFCRA): New Employee Leave Requirements

- FFCRA passed by Congress, signed by President Trump March 18
- Effective for leave taken between April 1 and December 31, 2020
- Applicable to all employers with “500 or fewer” employees
- Introduces federal paid sick leave mandate (2 workweeks)
- Expands the availability of the federal Family and Medical Leave Act (“FMLA”)
- Also provides an infusion of funds for states to use for unemployment insurance benefits, welfare benefit increases for the EBT, WIC and SNAP programs, and other issues
- **DOL issued regulations that interpret the statute, and change it somewhat**



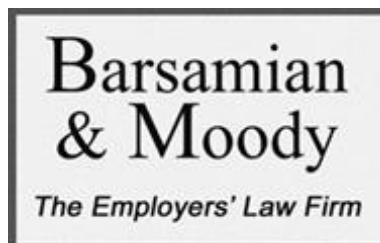
Federal Family and Medical Leave Act (FMLA) Changes

- **“Covered employer”** definition changed from those employers with “50 or more employees for 20 or more workweeks...” to those employers with “500 or fewer employees”
 - ✓ As of the day the employee’s leave begins
- **“Covered employee”** definition drastically changed from 1250 hours in the preceding 12 months to any employee who has worked for the employer for at least 30 days prior to leave
 - ✓ 30 calendar days, or
 - ✓ 30 days within prior 60 calendar days if laid off or terminate on or after 3-1-20 and rehired by 12-31-20



Federal Family and Medical Leave Act (FMLA) Changes

- **Possible “small business” exemption for BOTH expanded FMLA and paid sick leave:** U.S. Secretary of Labor can provide to small businesses (less than 50 employees) exemption if:
 - Granting paid sick leave or expanded FMLA leave would result in expenses and financial obligations exceeding available revenues and cause the business operating at minimal capacity;
 - The absence of the employee(s) requesting such leave would entail substantial risk to the financial health of operational obligations due to specialized skills, knowledge of the business or responsibilities; or
 - There are not sufficient workers who are able, willing, qualified and available to perform the work of the employee(s) requesting leave needed for the business to operate at minimal capacity.
 - Limited to those employees who make the employer meet the qualifications above, NOT all employees



Federal Family and Medical Leave Act (FMLA) Changes

- **Covered reasons for leave is expanded to include:**
 - ✓ Employees who are unable to show up to work or are unable to work remotely and they need to care for the employee's minor child if the child's school or day-care is closed due to a public health emergency related to the coronavirus pandemic.
 - ✓ This is the **ONLY** qualifying reason to take Emergency FMLA leave.



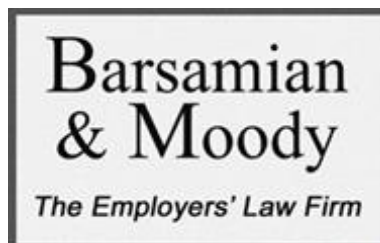
Federal Family and Medical Leave Act (FMLA) Changes

- **Some of the new leave will be paid:**
 - ✓ First ~~10 days~~ **2 weeks** may be unpaid (paid sick leave elsewhere in FFCRA may be available to cover this period)(**new regs**)
 - ✓ Employee may substitute any accrued paid leave (vacation, PTO, or state mandated paid sick leave) to cover the ~~10-day~~ **2 weeks** unpaid period
 - ✓ After initial ~~10-day~~ **2 weeks** period, employer must pay full-time employees at least two-thirds of the employee's regular rate for the number of hours the employee would otherwise have worked
 - ✓ Limited to \$200 per day up to a total of \$10,000 per employee



Federal Family and Medical Leave Act (FMLA) Changes

- **Some of the new leave will be paid:**
 - ✓ Part-time employees paid the average number of hours they would work in 2 weeks (or that the employee worked during the prior six months) (could be less than 80 hours)
 - ✓ Employees who have not yet worked six months should be paid based on the number of hours the employee expected to work (could be less than 80 hours)
 - ✓ Do not need to pay overtime premium, but must count overtime hours if employee is scheduled to work overtime



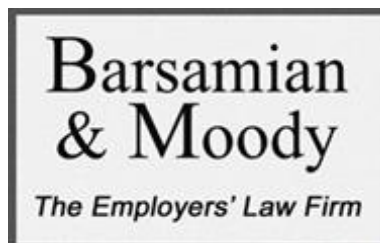
Federal Family and Medical Leave Act (FMLA) Changes

- Employers with less than 25 employees not required to reinstate an employee who has taken leave if position no longer exists because of an economic downturn or other such circumstances caused by the pandemic emergency during the leave
- Employer must make “reasonable attempts” to restore the employee to an equivalent position for up to a year



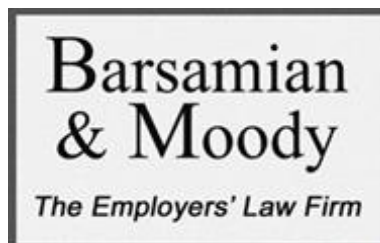
Federal Family and Medical Leave Act (FMLA) Changes

- Equivalent position means same benefits, pay and other terms and conditions of employment.
- The one-year timeframe is measured from the date leave ended or 12 weeks from when leave began, whichever is earlier.



Federal Family and Medical Leave Act (FMLA) Changes

- **Certain aspects of FMLA are not changed:**
 - ✓ Basic duration of FMLA leave still 12 weeks
 - ✓ Paid leave, after the initial 10 days of unpaid leave, does not extend beyond 12-week total duration of leave
 - ✓ General requirement that the employee provide notice for foreseeable leave is unchanged
 - ✓ For unforeseeable leave needs, the employee still required to provide as much notice as reasonably practicable



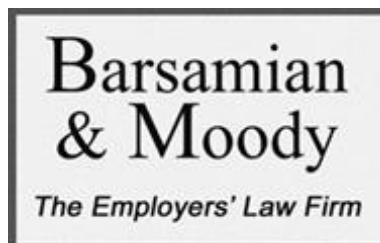
Federal Family and Medical Leave Act (FMLA) Changes

- **Counting 500 employees:**
 - ✓ Count temporary employees and FLC employees:
 - Threshold of "fewer than 500 employees" measured on the day the employee begins leave counting all employees in the US and its territories.
 - EEOC guidance takes the position that employees obtained through a temp agency are to be counted on the grounds that both the agency and the contracting entity have sufficient control over the conditions of employment to qualify.
 - Accordingly, employees would include full-time, part-time, seasonal, jointly employed, those on leave and temporary employees.



Federal Family and Medical Leave Act (FMLA) Changes

- **Counting 500 employees with multiple enterprises:**
 - ✓ As a general rule, EEOC uses a “single integrated employer” test for determining when to combine companies for FMLA purposes.
 - The degree of interrelation between the operations
 - The degree to which the entities share common management
 - Centralized control of labor relations
 - The degree of common ownership or financial control over the entities



Federal Family and Medical Leave Act (FMLA) Changes

- **Joint Employer Issues:**
 - ✓ Determination of “integrated employer” or “joint employer” may have far reaching implications
 - ✓ ALRA uses a similar test to determine union coverage
 - ✓ If employer takes the position under leave laws that it is integrated and over 500 employees, then the ALRB may attempt unit clarification or accretion



FFCRA Paid Sick Leave

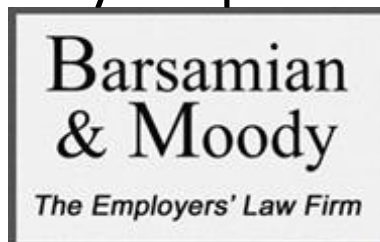
- Requires employers to provide eligible employees with paid sick leave if the employee is:
 1. Subject to a federal, state or local quarantine or isolation order due to coronavirus
 2. Advised by a health care provider to self-quarantine due to coronavirus
 3. Experiencing coronavirus symptoms (fever, dry cough shortness of breath) and is seeking medical diagnosis
 4. Caring for an individual (immediate family member, roommate, some other personal relationship) who is subject to a federal, state or local quarantine or isolation order, or who is advised by a health care provider to self-quarantine due to coronavirus



FFCRA Paid Sick Leave

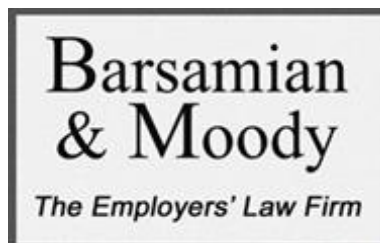
- Requires employers to provide eligible employees with paid sick leave if the employee is:
 5. Caring for the employee's child if the child's school or day-care is closed or the child's day-care provider is not able to provide the normal care due to a public health emergency related to coronavirus (if no other suitable person can care for the child - this is different); or
 6. Experiencing any other substantially similar condition set forth by the Secretary of Health and Human Services after consultation with the Secretary of the Treasury and the Secretary of Labor

ONLY six reasons to qualify for paid sick leave



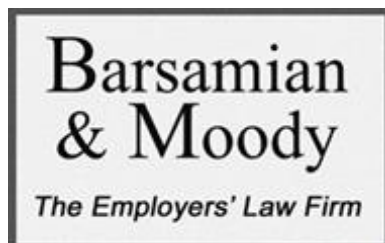
FFCRA Paid Sick Leave

- ✓ Employers with 500 or fewer employees provide fulltime employees with 80 hours of paid sick leave:
 - at the employee's regular rate of pay if the leave is due to their own health situation (1-3), or
 - two-thirds the employee's regular rate of pay if the leave is to provide care for somebody else (4-6)
 - Part-time employees entitled to paid leave based on average number of hours worked during the prior six months



FFCRA Paid Sick Leave

- ✓ Part-time employees who have not yet worked six months are entitled to the average number of hours the employee would normally work in a two-week period ([Seasonal employee see DOL FAQ 75](#))
- ✓ Full-time employees may request that the employer pay them the 80 hours of paid sick leave in place of the ~~10 days~~ 2 weeks of unpaid Emergency FMLA leave discussed above
 - ✓ This is a way to get the first ~~10 days~~ 2 weeks of FMLA leave for the single qualifying reason paid



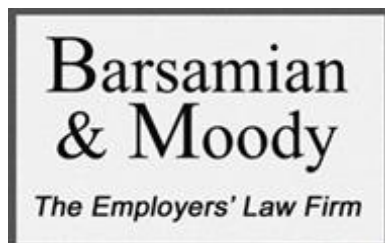
Paying For Leaves

- ✓ If employee has not worked six months, then average of each week worked or scheduled
- ✓ Include commissions, bonuses, and piece rates in calculation
- ✓ Compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.



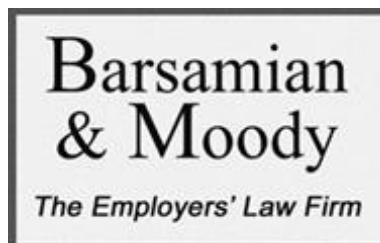
FFCRA Paid Sick Leave

- ✓ Limits paid sick leave to:
 - \$511 per day, capped at \$5,110, for leave related to the employee's own health situation
 - \$200 per day capped at \$2,000, for leave to provide care for somebody else
 - Do not need to pay overtime premium, but must count overtime hours if employee is scheduled to work overtime
- ✓ Does not carry over to subsequent years
- ✓ FFCRA expires by its own terms on December 31, 2020



Paying For Leaves

- ✓ Sick leave due to employee's own quarantine or illness is paid at the 100% of the employee's regular rate
- ✓ Family and medical leave to care for child is paid at 2/3 the employee's regular rate
- ✓ Sick leave due to caring for someone else who is quarantining or to care for a child is paid at 2/3 the employee's regular rate

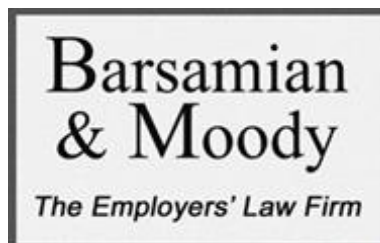


FFCRA Paid Sick Leave

- ✓ Immediately available, no qualifying period of prior employment
- ✓ Must be provided in addition to any paid sick leave currently provided by employers or mandated by state law (3/24 in CA – 40 hrs in AZ)
- ✓ The Secretary of Labor posters in English and Spanish:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

<https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/1422-spanish.pdf>



Special Notes

- ✓ Intermittent leave only if both employer and employee agree
 - ✓ If taking paid sick leave for reasons 1-3 or 6, and the employee is not teleworking, all paid sick leave must be taken in one block
- ✓ Only FMLA that is paid is the leave taken to care for a child due to school or care provider closure
- ✓ Law is not retroactive



CARES Act

Multiple federal programs to help businesses stay in operation **(this is very summarized – please check with an SBA lender of your choosing for the full technical details of each program)(for an overview prepared by UBS Financial Services see [UBS Overview](#)**

- **Paycheck Protection Program** [Treasury Department Info Page](#)
 - SBA loans
 - No SBA fees
 - 500 or fewer employees
 - 250% of monthly payroll, capped at \$10 million
 - February 15, 2020 to June 30, 2020
 - Businesses with seasonal employees may use March 1, 2020
- Payroll, group health care, rent, mortgage interest, utilities, etc.
- Individual employee comp capped at \$100,000



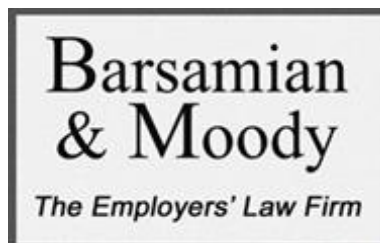
CARES Act

- **Paycheck Protection Program continued**
 - Employer must certify that :
 - Needs loan to support operations
 - Loan will be used to retain workers, maintain payroll or pay qualifying expenses
 - Employer does not have another loan app for the same purposes
 - Employer has not received another loan for the same period of time
 - If the business uses the loan funds for qualifying purposes, loans may be forgiven
 - Must apply for forgiveness
 - Funds may **NOT** be used to pay for coronavirus related expenses, such as paid sick leave



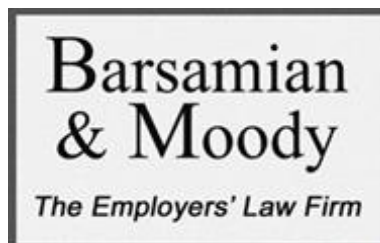
CARES Act

- **Small Business Debt Relief Program**
 - Small businesses (<https://www.sba.gov/fundingprograms/loans>)
 - Various types of SBA loans
 - 7(a) loans
 - Up to \$5 million if you lack credit elsewhere
 - Purchase a business, refinance business debt, purchase furniture, supplies, fixtures
 - 504 loan
 - Up to \$5.5 million to acquire fixed assets for expansion or modernization
 - Microloan
 - Up to \$50,000 for start up or expansion
 - SBA covers repayment for six months
 - Principal, interest and fees



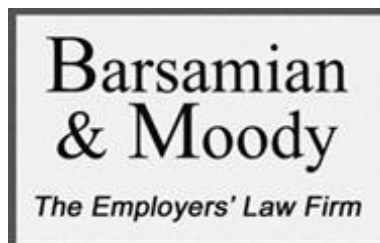
CARES Act

- **Economic Injury Disaster Loans & Emergency Economic Injury Grants**
 - Loans or grants up to \$10,000
 - Apply for the EIDL loan and then request an advance
 - Advance is not repaid
 - Use to keep employees on the payroll, pay sick leave, business expenses, etc.
- **Delay Payment of Employer Payroll Taxes**
 - Defer payment of employer share of some payroll taxes through the end of 2020
 - Employer share of FICA taxes
 - UNLESS getting assistance through Payroll Protection Program
 - Half due at end of 2021 and half due at end of 2022
 - **Please check with your tax professional**
- **FLC and Growers need to discuss who can get the benefits and ways to share it**
 - **Who can get the PPP for example...the rules do not contemplate Grower-FLC relationships**



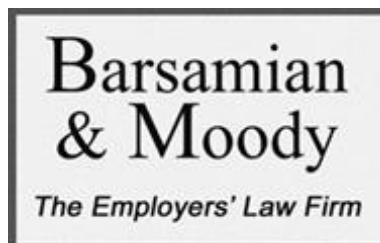
Overview of FFCRA Tax Credits

- ✓ **Please consult your tax professional!**
- ✓ Tax credits against quarterly federal income tax, ~~Social Security taxes~~ and Medicare taxes to defray cost of leave (See the new FAQs: [IRS Guidance and FAQs](#) (FAQs 6, 10 and 55))
 - ✓ Note that the FAQs do not always agree with the Guidance
 - ✓ Payments to employees are wages subject to taxes and eligible for 401(k), etc.
- ✓ Employers will be reimbursed if their payments of qualified sick leave or qualified paid family leave exceed the taxes they owe
- ✓ The paid sick leave tax credit is 100% of the qualified sick leave wages paid in each calendar quarter.
- ✓ The paid family leave tax credit is 100% of the qualified family leave wages paid in each calendar quarter.



FFCRA Sick Leave Tax Credits

- ✓ For each employee who is unable to work because of Coronavirus quarantine symptoms and is seeking a medical diagnosis, eligible employers may take a sick leave credit for sick leave at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a total of 10 days.
- ✓ For each employee who is caring for someone with Coronavirus, or who is caring for a child, employers may take a credit for two-thirds of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for up to 10 days.



FFCRA Child-Care Leave Tax Credits

- ✓ Eligible employers may take child-care leave tax credit equal to two-thirds of each employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate.
- ✓ Up to 10 weeks of qualifying leave can be counted towards the child-care leave tax credit.
- ✓ Additional tax credit determined on costs to maintain health insurance coverage for the eligible employee during the leave period (addressed in the new FAQs).



Prompt Payment for the Cost of Leave

- ✓ Employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS.
- ✓ The payroll taxes that are available for retention include withheld federal income taxes, ~~the employee share of Social Security and Medicare taxes,~~ and the employer share of ~~Social Security and~~ Medicare taxes. (See the new FAQs: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#basic> (FAQs 6 and 10))
 - ✓ Note that the FAQs do not agree with the Overview.

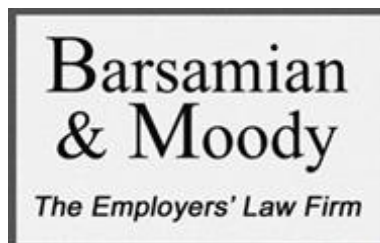


Recordkeeping for Tax Credits

A more detailed explanation of how to claim tax credits is located at:

<https://www.irs.gov/forms-pubs/about-form-7200>

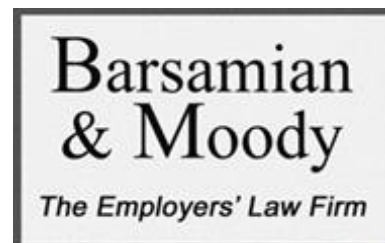
<https://www.irs.gov/pub/irs-drop/n-20-21.pdf>



Growers and FLC Need to Discuss the Credit

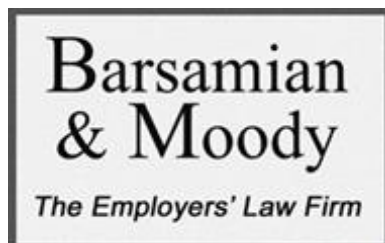
Growers and FLCs need to discuss the credit, and who gets the benefit of taking it.

Who is responsible for actually paying the sick leave paid, for example, and who takes the credit against the taxes?



Coronavirus Resources

- ✓ [Barsamian & Moody](#)
- ✓ [LWDA Resources for COVID-19](#)
- ✓ [Cal/OSHA Guidance](#)
- ✓ [FELS Covid-19 Resource Page](#)
- ✓ [CDC Covid-19 Resource Page](#)
- ✓ [Updated Dept of Labor FAQ & New Regulations](#)
- ✓ [Updated IRS Guidance on Tax Credits](#)
- ✓ [Employee Leave Rights Poster in English & Spanish](#)



Thank You!

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