



CONSTANGY
BROOKS, SMITH &
PROPHETE LLP

An Employer's Guide to CARES ACT and UPDATE ON FFCRA (Part II)

Timothy A. Davis (816.329.5910/913.205.8647)
tadavis@constangy.com

As of 4/2/2020

A wider lens on workplace law



Agenda

- Employment-Related Provisions of CARES Act
- Families First Coronavirus Response Act--Updates
- Practical Workforce Planning



Since Last Week: Where Are We Now?

- Social distancing extended through 4/30/20 and Likely to Go Through May
- Shelter in place/stay at home orders in more locales, with exceptions for “essential businesses”
- Increased COVID-19 diagnoses, with more individuals subject to isolation or quarantine
- Marked increase in unemployment claims related to COVID-19 slowdowns or shutdowns
- FFCRA took effect 4/1/20
- CARES Act, enacted 3/27/20 – Loans Available as of 4/3/2020 **(CALL BANKER NOW)**



Coronavirus Aid, Relief and Economic Security Act (CARES Act)

- Paycheck Protection Program
 - SBA loans to cover payroll and other designated expenses
 - Potentially forgivable loans with incentives for keeping workers on the payroll
- Emergency EIDL Grants
- Enhanced Unemployment Benefits
 - Increased benefits and expanded entitlement period to those eligible for unemployment under state law
 - Expands coverage to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others)
- Payroll Tax Credits/Deferral



NOT ONE SIZE FITS ALL LAW



Paycheck Protection Program

- Amends Section 7(a) of Small Business Act to provide 100% federally guaranteed and possibly forgivable loans
- Applies to loans from 2/15/20 – 6/30/20
- Available to entities with fewer than 500 employees and certain sole proprietors, independent contractors, and self-employed
 - For food service and accommodation industry, 500 or fewer employees per physical location
 - For those operating as franchise or receiving financial assistance from SBIC, normal affiliation rules do not apply
- Loans made by SBA through authorized lenders
- Certain SBA procedural requirements (e.g., no credit elsewhere, personal guarantee, collateral) and administrative fees waived
- **May NOT be for you if you will have to significantly reduce workforce between April 26 and you are unlikely cannot restore workforce by June 30.**



Key Website For Loan Consideration

- THIS IS POTENTIALLY FREE MONEY TO HELP YOU IN TIME OF NEED. TALK TO YOUR BANKER NOW!!!!
- <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources#section-header-2>



Maximum Loan Amount

- The lesser of:
 - 2.5X average total monthly payroll costs for one-year period before loan origination, or
 - \$10,000,000
- Alternative computation methods for entities not in business in 2019 and for seasonal employers
- 7(b)(2) disaster relief loans made after 1/31/20 may be refinanced as part of covered loan



Payroll costs defined broadly

- Salary, wage, commission, or similar compensation
- Payment of cash tips or equivalent
- Payment for vacation, parental, family and medical, medical, or sick leave
- Allowance for dismissal or separation
- Payment for group health insurance, including premiums
- Payment of retirement benefits
- State or local taxes assessed on earnings



Payroll costs exclude

- Compensation of an individual employee in excess of an annual salary of \$100,000, prorated for covered period
- Taxes imposed or withheld
- Compensation of employee whose principal residence is outside the U.S.
- Qualified sick leave/family and medical leave for which credits are allowed under FFCRA



Paycheck Protection Program

- Lenders will consider whether applicant:
 - Was in operation on 2/15/20
 - Had employees for whom it paid salaries and payroll taxes or paid independent contractors as reported on Form 1099s
- Borrowers must certify:
 - That the loan request is necessary to support ongoing operations due to the uncertainty of current economic conditions
 - That the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments
 - That no duplicative Section 7(a) loan application is pending and that, during the period of 2/15/20 through 12/31/20, the borrower has not received funds under 7(a) for same purpose



Allowable uses—2/15/20 through 6/30/20

- In addition to allowable uses of 7(a) loan (short- or long-term working capital, refinancing business debt, etc.), borrowers may use proceeds for:
 - Payroll costs
 - Costs related to continuation of group health care during periods of paid sick, medical, or family and medical leave, and insurance premiums
 - Employee salaries, commissions, or similar compensations
 - Interest payments on mortgage obligations
 - Rent, including rent under lease agreement
 - Utilities
 - Interest on debt obligations incurred before 2/15/20



Loan forgiveness

- Eligible for loan forgiveness on amount spent during 8-week period after loan originated on:
 - Payroll costs
 - Payment of interest on mortgage obligations incurred before 2/15/20 in ordinary course of business
 - Payment of interest on rent obligations based on lease in effect before 2/15/20
 - Covered utility payments (electricity, gas, water, transportation, telephone, or internet access for which service began before 2/15/20)
 - Additional wages paid to tipped employees
- Forgiveness cannot exceed principal
- Considered cancelled indebtedness



Loan forgiveness—required documentation

- Borrower seeking loan forgiveness must submit to lender serving the loan:
 - Documentation verifying the number of FTE equivalent employees on payroll and pay rates for relevant time periods, including
 - Payroll tax filings reported to the IRS, and
 - State income, payroll, and unemployment insurance filings
 - Documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments



Reduction in loan forgiveness

- Forgiveness amount will be reduced if borrower reduces number of FTE employees or reduces salary/wages by more than 25%, compared with 2/15/20
 - Multiply amount of loan forgiveness by quotient obtained from dividing:
 - Average number of FTE employees per month during 8 weeks after loan origination by, at the borrower's election:
 - Average number of FTE employees per month from 2/15/19 to 6/30/19, or
 - Average number of FTE employees per month from 1/1/20-2/29/20
 - Deduct the amount of any reduction in total salary/wages of any employee during 8 weeks after loan origination that exceeds 25% of total salary/wages of the employee during most recent full quarter during which employee was employed before the 8-week period



Rehires/reinstatement of pay

- Amount of loan forgiveness determined without regard to reduction in FTE employees or reduction in salary/wages for period of 2/15/20 to 30 days after enactment of CARES Act (4/26/20) if, not later than 6/30/20, borrower has eliminated the reduction in employees or salary/wages
- To maximize loan forgiveness:
 - Any temporary reductions in workforce or salary/wages that might be needed should be conducted by 4/26/20
 - To the extent needed and possible, employees should be reinstated and salary/wages should be restored:
 - During 8 weeks after loan origination IF OPERATIONALLY BENEFICIAL, to increase forgivable amount
 - By 6/30/20, to avoid reduction in loan forgiveness



Remaining balance after loan forgiveness

- Guaranteed by Small Business Administration
- Maximum maturity of 10 years from application for loan forgiveness
- Interest rate not to exceed 4%
- Deferred payment of principal, interest and fees for 6 months to 1 year
- No prepayment penalty
- SBA guidance due 15 days after enactment
- More information coming soon: www.sba.gov



Example (No Layoffs)

- 25 FTEs with average wage of \$25 per hour payroll costs (including health insurance costs, etc.)
- Average monthly payroll approximately \$108,000
- Loan amount \$270,000
- Loan taken out 5/1/20
- Can use \$270,000 to cover your payroll cost and any rent, utilities or mortgage interest incurred until 6/26/20
- 100% forgivable if used for appropriate costs



Example (Layoffs)

- 25 FTEs with average wage of \$25 per hour payroll costs (including health insurance costs, etc.)
- Average monthly payroll approximately \$108,000
- Loan amount \$270,000
- Loan taken out 5/1/20
- Layoff 15 FTEs on 5/30/20
- Average FTEs for eight week covered period 17.5
- 17.5 divided by 25 equals (.7)
- \$270,000 times .7 equals \$189,000 total loan forgiveness
- \$81,000 that is not forgiven



Example (Layoffs Before 4/26/20)

- 25 FTEs with average wage of \$25 per hour (including health insurance costs, etc.)
- Average monthly payroll approximately \$108,000
- Loan amount \$270,000
- Layoff 15 FTEs on 4/15/20 (before 4/26/20 grace period)
- Loan taken out 5/1/20
- Restore FTEs 6/29/20 (must get definition of “restore”)
- Average FTEs calculation remains 25
- Full Loan Forgiveness if Used For Covered Reasons During Covered Period (i.e. much lower payroll but could use to cover other areas such as rent, health insurance costs, etc.)



CARES Act--Emergency EIDL Grants

- Expands SBA Emergency Injury Disaster Loans (EIDLs) available to businesses with not more than 500 employees for period of 1/31/20 through 12/31/20
- For EIDLs in response to COVID-19 during covered period, waives rules regarding personal guarantee on loans below \$200,000, requirement of being in business for 1 year (as long as in operation on 1/31/20), and applicant unable to obtain credit elsewhere
- Approve based solely on applicant's credit score or use alternative method for determining applicant's ability to repay
- May request emergency advance, up to \$10,000, payable by Small Business Association within 3 days after submitting application
- Advance may be used for allowable purposes under 7(b)(2) of SBA, including
 - providing paid sick leave to employees unable to work due to COVID-19
 - maintaining payroll to retain employees during business disruptions or substantial slowdowns
 - Meeting increased costs to obtain materials unavailable due to interrupted supply chains
 - Making rent or mortgage payments, and
 - Repaying obligations that cannot be met due to revenue losses
- Applicant shall not be required to repay any amounts of the advance, even if 7(b)(2) loan is subsequently denied
- If applicant receives advance and is approved for Payroll Protection Program loan, advance shall be reduced from the loan forgiveness amount



CARES Act--Payroll Tax Credits

- Refundable payroll tax credit for 50% of wages (up to \$10,000 per employee) paid each calendar quarter during COVID-19 crisis
 - Excludes paid sick/family and medical leave under FFCRA
 - Includes qualified health plan expenses
- Available to businesses whose:
 - Operations were fully or partially suspended due to orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19, or
 - Receipts declined by more than 50% when compared to the same quarter in 2019
- For employers with:
 - 100 or fewer fulltime employees, covers wages paid to all employees during any applicable quarter in which there was COVID-19 impact as described above
 - More than 100 fulltime employees, only covers wages for employees not providing services due to COVID-19 impact
- May not exceed applicable employment taxes in any one quarter
- Employer who receives forgivable loan under Paycheck Protection Program **not eligible** for tax credits



CARES Act--delayed payment of payroll taxes

- All employers and self-employed individuals may defer payment of the employer share of payroll taxes owed on wages paid for period beginning on date of enactment (3/27/20) and ending 12/31/20
 - 50% due by 12/31/21
 - 50% due by 12/31/22
- **Does not apply** to any taxpayer who receives loan forgiveness on Paycheck Protection Program loan



CARES Act--Enhanced Unemployment Benefits

- Emergency Increase in Unemployment Compensation benefits—amount entitled to receive under state law + \$600/week (through 7/31/20)
- Pandemic Emergency Unemployment Compensation—extended benefits for up to additional 13 weeks if exhausted rights to unemployment benefits under state law (for a total of 39 weeks in most states)
- Pandemic employment assistance to individuals not otherwise eligible—self-employed, insufficient earnings during base period, etc.—who are out of work for specified reasons related to COVID-19 (39 weeks)



Practical Considerations for Employers

Everyone's Situation Is Unique

- Are you presently operating? Do you expect that to continue, given business needs and any restrictions that apply to you?
- Have you already laid off/terminated employees?
- What is your projection for staffing needs in upcoming months?
- What is your cash flow situation? Can you continue to cover operating expenses while awaiting relief?



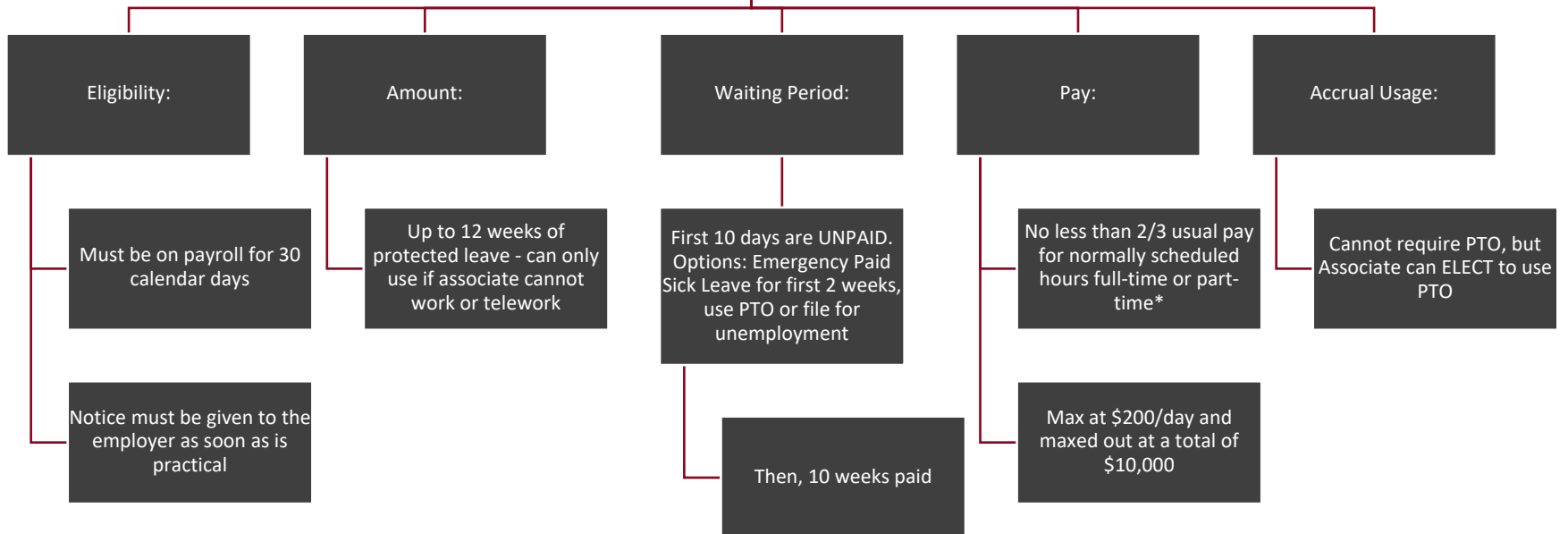
Revisiting Families First Coronavirus Response Act

- Applies to qualifying family and medical or paid leave between 4/1/20 and 12/31/20 (not retroactive)
- Guidance/FAQs/New Regulations/Poster available on www.dol.gov
- May satisfy posting requirement by:
 - Posting notice in conspicuous place on premises
 - If workforce is teleworking, by emailing or direct mailing the notice, or by posting notice on internal or external website providing employee information
- Must post by 4/1/20
- Need only provide notice to current employees



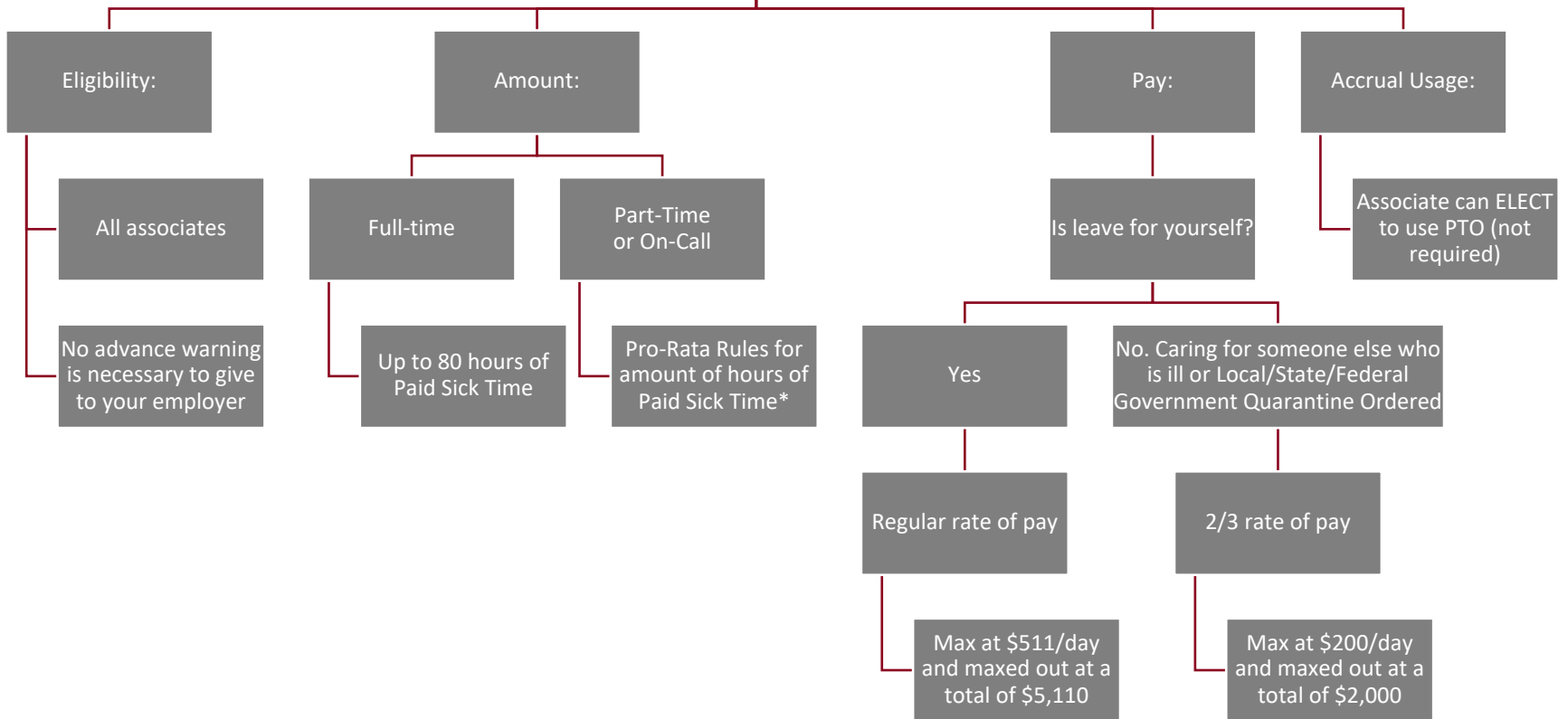
Families First Coronavirus Response Act - Stipulations

Emergency FMLA Expansion Act (leave due to childcare if school or daycare closes)



Families First Coronavirus Response Act - Stipulations

Emergency Paid Sick Leave (2 weeks)



Emergency Paid Sick Leave

- Qualifying Events:
 - Employee subject to a federal, state or local quarantine or isolation order related to COVID-19 (e.g., California, Kansas);
 - Employee advised by a health care provider to self-quarantine due to COVID-19 concerns (includes if HCP advises employee to stay at home due to underlying health condition);
 - Employee experiencing COVID-19 symptoms and seeking medical diagnosis;
 - Employee caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns (generally a close family member or someone sharing living space with);
 - Employee caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency (other suitable care provider must not be available); or
 - Employee 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.



FFCRA— Updates

- Regular rate of pay—average rate of pay for 6 months preceding leave, including commissions, tips and piece rates
- For part-time employees, determine average number of work hours in 2-week period
 - Number of hours employee regularly scheduled to work
 - If normal hours scheduled are unknown or if schedule varies, use 6-month average
- family and medical leave expansion requires paid leave to include overtime hours normally worked, but not paid sick leave (limited to 80 hours)
- No need to include overtime premium under paid sick leave of expanded family and medical leave



FFCRA—DOL on calculating paid leave

- Regular rate of pay—average rate of pay for 6 months preceding leave, including commissions, tips and piece rates
- For part-time employees, determine average number of work hours in 2-week period
 - Number of hours employee regularly scheduled to work
 - If normal hours scheduled are unknown or if schedule varies, use 6-month average
- family and medical leave expansion requires paid leave to include overtime hours normally worked, but not paid sick leave (limited to 80 hours)
- No need to include overtime premium under paid sick leave of expanded family and medical leave



FFCRA—DOL on “stacking” of leave

- Total of 2 weeks (or 80 hours) paid sick leave available, for any combination of qualifying reasons
- Employee home with child because school or child care center is closed, or child care provider is unavailable, may be eligible for 2 weeks of paid sick leave and expanded family and medical leave, for a total of 12 weeks of paid leave
- Employee may take 12 weeks of family and medical leave total, including both “traditional” and expanded FMLA leave
- Employee eligible for paid sick leave no matter how much FMLA leave might have previously been taken



FFCRA—DOL on documentation of leave

- Employers that provide paid sick leave and expanded family and medical leave are eligible for reimbursement through refundable tax credits
- If you intend to claim tax credit, retain appropriate documentation (e.g., notice posted on government, school, or day care website regarding closure)
- Consult IRS for applicable forms, instructions and information to be retained to support the credit



FFCRA—DOL on closure of worksite

- If employer closes worksite, either before 4/1/20 or after FFCRA becomes effective, and no work is available for employee to do, the employee will **not** receive paid sick leave or expanded family and medical leave, but might be entitled to unemployment benefits
- If worksite closes while employee on paid sick leave or expanded family and medical leave, employer must pay for any leave used before closure
- True regardless of whether employer closes worksite for lack of business or due to federal, state, or local directive



FFCRA—DOL on group health coverage

- Employer must continue group health coverage during expanded family and medical leave, although employee must continue making any normal contributions to cost of coverage
- While on paid sick leave, must continue group health coverage based on plan language treating absence from work due to any health factor as being actively at work
- Otherwise, COBRA applies to employers with 20 or more employees upon separation or reduction in work hours



FFCRA—DOL on small business exemption

Employer with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave and (b) expanded family and medical leave when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- 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 labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.



