



PROGRAM MATERIALS
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Legal and Practical Considerations for Employers Returning to Work Amid the Pandemic

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5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

Return to Work Considerations Amid Coronavirus

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*Presented By:
Valerie K. Ferrier*

*Partner, Head of Labor & Employment Practice
Group*

212-916-0920 | valerie.ferrier@mcblaw.com

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Agenda

- Practical Considerations for Return to Work
- Sick Leave
- Preview of Anticipated Lawsuits
- What Employers Can Do to Protect Themselves

Practical Considerations for Reopening

Employee Testing

- concerns about the results
 - Any information collected is confidential
 - Testing is not necessarily accurate
 - Results may differ depending on who administers the test/reports the results
- Temperature checks
 - Who administers?
 - What does it tell you?

Employee Testing

- *Know the difference!*
- Covid testing
 - This is acceptable
 - Someone with an active infection legally poses a “direct threat” to the workplace
- Antibody testing
 - This tells you (maybe) if someone has ever been exposed
 - EEOC says it violates the ADA

Additional Considerations

- Social distancing
- Reorganizing your space
 - One-way hallways
 - Six feet between desks
- Air circulation/fresh air
- Cleaning
- Resurgence of infection

What if Employees Don't Want to Come Back?

- Making more money on unemployment
 - Federal \$600 supplement runs out in July
 - Ineligible for unemployment if refuses work
- Scared of getting sick
 - Has to be more than fear
- Be flexible

PTO Considerations

- What to do about paid time off?
- Let employees roll-over unused time
- Let employees donate time to each other
- If you have strict categories of PTO (personal day/sick/vacation), consider making it all the same

What About Rent/Mortgage?

- No relief – yet
- Call someone – City Council person, Congressional Rep.
- Try to cut a deal – more up front for a discount

Sick Leave

Families First Coronavirus Response Act (“FFCRA”)

- Starting April 1, 2020 through December 31, 2020
- Applies to businesses with fewer than 500 employees (including full time and part time)
- Only applies to employees who cannot work *at all*, even remotely

FFCRA continued

- Provides up to 80 hours (i.e., two weeks) of paid leave at regular rate of pay to those who are sick or under quarantine due to Coronavirus symptoms
 - This is *in addition* to whatever paid time off is already provided by the employer, State, and local law
- Provides up to 80 hours at up to 2/3 the employee's regular rate of pay if they need to care for someone under quarantine, or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for COVID-19 related reasons
- Employers must post notice of benefits

FFCRA continued

- The law is not retroactive, so if you already gave sick time before April 1, it's categorized differently
- Only applies to people who are actually sick or caring for those who are, or for child care due to Covid19
 - The law does not apply if you're sick with something else, or if you're just scared to come to work

FFCRA continued

- Also provides up to an additional 10 weeks of paid family leave at 2/3 employee's regular rate of pay
 - Employee must have worked at least 30 days
 - Employee must be unable to work due to a bona fide need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19 – *not* summer vacation
 - May be fewer than 10 weeks if employee already took FMLA in the past year
 - Employee can choose to supplement 1/3 shortfall by taking employer-provided paid time off, up to 100% of regular pay, if employer agrees to provide it (you don't have to)

FFCRA Continued

- But businesses with fewer than 50 employees may be exempt from providing leave due to school closings or child care unavailability, if the leave requirements would “jeopardize the viability of the business as a going concern”

What does “jeopardize the viability of the business as a going concern” mean?

- Providing 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 person 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.

FFCRA continued

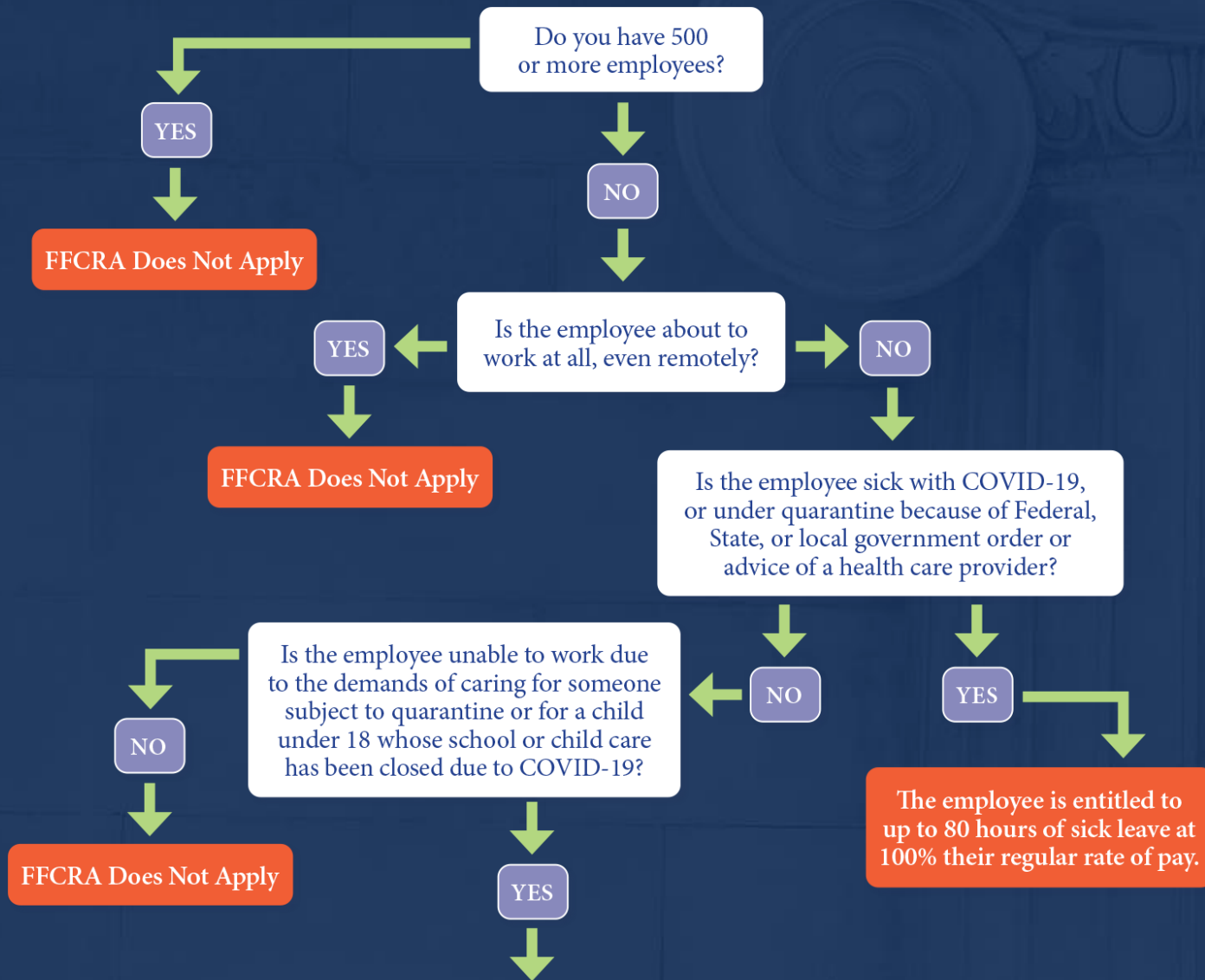
- Dollar for dollar tax credit available to employers who provide leave (up to the statutory amount of the leave)
- Must save records demonstrating employee entitlement to the leave in order to claim the tax credit
- *If employee does not provide the documentation, you do not have to provide paid leave!*
- Leave can be taken in increments, as agreed between employee and employer
- *But if you employ a health care provider or an emergency responder you are not required to pay such employee paid sick leave or expanded family and medical leave on a case-by-case basis*

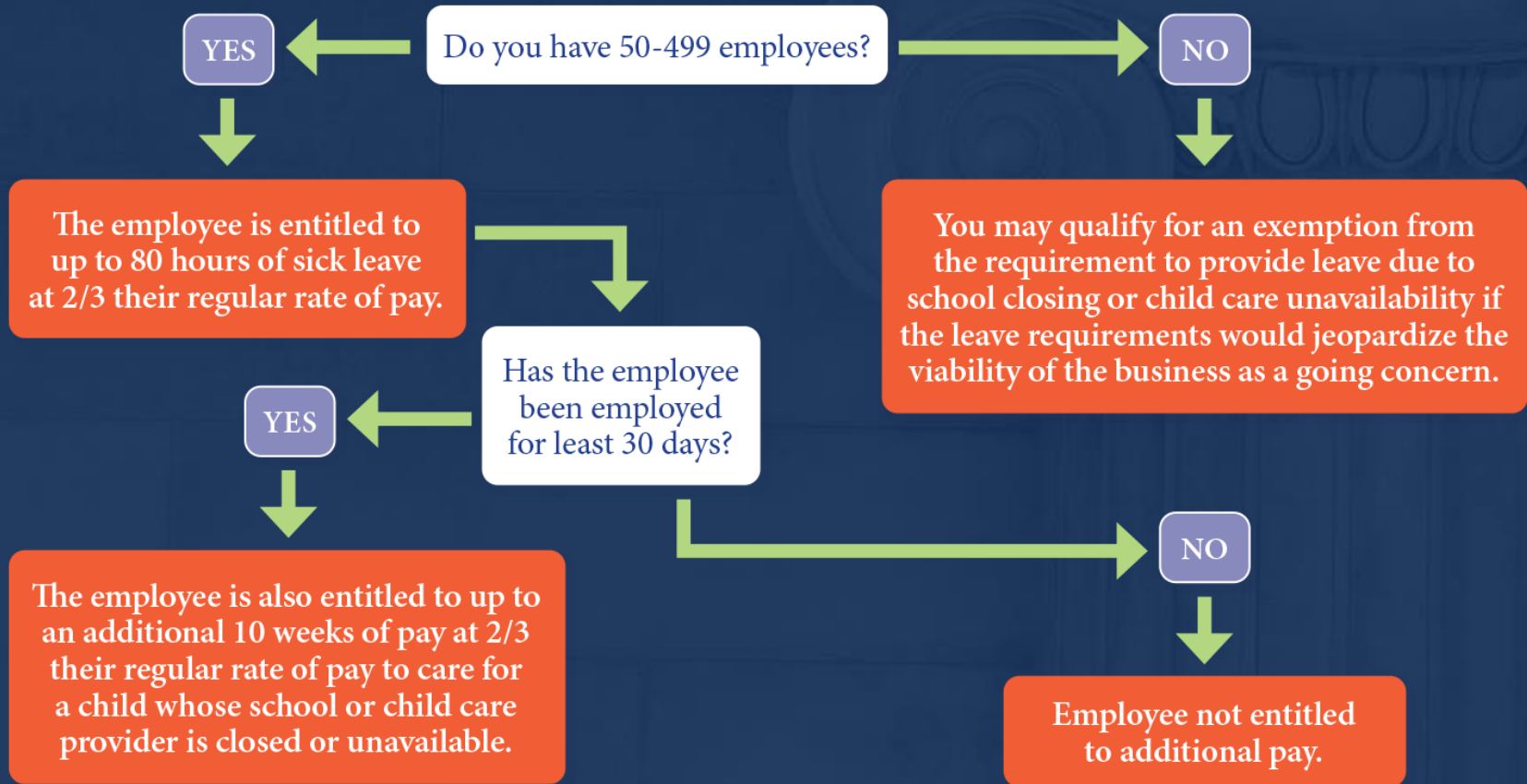
What about Health Insurance?

- You must continue an employee's group coverage (if offered) while they are using FFCRA sick leave
- Employees must continue to pay their contributions to group plans (if any)

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

Use this chart to determine your sick leave requirements under the FFCRA.





Preview of Anticipated Lawsuits

Get Ready to Get Sued

- The pandemic has highlighted income inequality
- Employees are desperate, and possibly mad
- Undocumented employees are not eligible for the federal stimulus or unemployment
- Plaintiffs' lawyers are also desperate
- All of this adds up to a likely coming onslaught of employment law cases just as businesses are trying to reopen

Be on the Look-out for Lawsuits:

- Misclassification
 - Employees paid a salary
 - Employees paid the same amount every week for the same number of hours every week
 - Independent contractors
 - Domestic help
 - Nannies
 - Housekeepers
 - Home Health Aides/Elder Care Givers

Other Lawsuits

- Covid-related claims
 - OSHA – unsafe workplaces, lack of PPE
 - Denial of sick time
 - Discrimination against sick people (or in favor of people with antibodies)
 - Negligence claims based on endangerment/emotional distress
- Wage and Hour
 - Unpaid overtime
 - Statutory violations (paperwork)

Protecting An Employer's Business

Don't Invite a Discrimination Lawsuit

- Be careful how you bring people back
 - Try to have objective criteria if possible
 - Don't bring back everyone except one protected group
 - Don't favor a certain group or disfavor another
 - Don't discriminate against people who have been sick (or who have not been)
 - Take people's individual circumstances into account (child care issues, etc.)

Don't Invite a Discrimination Lawsuit

- Age/Vulnerable Populations
 - The EEOC warns employers not to be paternalistic
 - Don't refuse to allow vulnerable population employees to return to work
 - Don't make decisions about individual employees "for their own good"
 - Enact safety measures for everyone and let people make their own decisions

What Can you Do?

- Be flexible, creative, and understanding
- Get EPL Insurance
 - Only covers discrimination, wrongful termination, retaliation
 - Does not cover wage and hour or misclassification claims
- Prepare for a lawsuit
 - Anticipate settlements/legal fees

Questions?

212-916-0920

Valerie.ferrier@mcblaw.com

Connect on LinkedIn:
[linkedin.com/in/valerie-k-ferrier](https://www.linkedin.com/in/valerie-k-ferrier)

