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**Updated August 9, 2021**

**Via Electronic Delivery**

Clients and Friends

RE: Families First Coronavirus Response Act Policy and Form Suite

Dear Colleague:

The landscape of employer commitments and obligations in response to the COVID-19 pandemic has been in a state of constant change since March 13, 2020, when the U.S. House of Representatives passed the first draft of the Families First Coronavirus Response Act (FFCRA). The FFCRA became effective on April 1, 2020, creating two new forms of paid leave: Emergency Paid Sick Leave and Emergency Family Medical Leave Act Expansion. The FFCRA contained an automatic sunset provision for these leaves of December 31, 2020. However, in January 2021 and again in March 2021, the Government extended to employers the option to continue either or both of the FFCRA leaves. Employers may, but are not required to, provide either or both of these leaves until September 30, 2021. The newest extension of the voluntary leaves takes effect April 1, 2021, and is described in our [eblast here](#).

While the DOL and IRS have provided steady (if sometimes conflicting) guidance, the agencies have not provided model forms to administer these leaves. So, since March 2020, we've been providing you with model policy language as well as four model forms, which are updated with major developments. These are being provided to you in Microsoft Word format for you to incorporate into your handbook, add your company's logo, change the relevant contact points and titles, and make other changes in consultations with legal counsel as you see fit. Instructions on form use follow below. But first, two caveats: (1) this policy and these forms do not attempt to address the patchwork of state and local leave laws, nor do they address your organization's existing leave policies; (2) these forms are current as of August 9, 2021. Things change by the minute. Please review our [Breaking News page](#) and the [DOL's COVID-19 and the American Workplace page](#) regularly for updates.

**Model Policy:** A quick primer on the employer's options are highlighted in yellow. Similarly, employers of healthcare providers will want to address whether they will extend FMLA coverage to healthcare employees as indicated in the highlighted section at the top of the policy. You should remove highlighting and inapplicable language prior

to publication. *The highlighted areas do not contain policy language but describe your options. You should fill in text here as appropriate and in consultation with legal counsel. Also, as leaves are now optional, you may choose to provide either EFMLA, EPSL, or neither. If you choose “neither,” no policy is needed.* September 16, 2020 Update: A federal judge in the Southern District of New York has ruled that the provision of intermittent EFMLA leave is an employer requirement, and not an employer option. The ruling also stated that FFCRA leaves were available to employees whose employers did not have work for them to perform, that the DOL’s definition of “health care provider” was impermissibly broad, and that leave could not be delayed while awaiting employee documentation. The DOL has issued revised regulations effecting the following key changes: (1) narrowing the definition of health care provider employees who may be denied FFCRA leaves and (2) clarifying that intermittent leave should still be with employer approval only, but in cases of hybrid school schedules, employees would be entitled to leave tracking their children’s schedules.

**Request for Emergency Paid Sick Leave and/or Emergency FMLA Expansion**

**Leave:** This request form is designed to cover both requests for Emergency Paid Sick Leave and Emergency FMLA Leave, which, under ARPA’s voluntary extension provision, have concurrent reasons for leave. Employers must maintain certain records, including the employee’s name, the dates for which leave is requested, the COVID-19-related reason for the request, the employee’s affirmation that they are unable to work or telework for that reason; if seeking leave due to government quarantine or isolation order, the name of the government entity issuing the order; if seeking leave due to being advised by a health care provider to self-quarantine, the name of the health care provider; if seeking leave to care for another person who is under an isolation order, quarantine order, or has been advised by a health care provider to self-quarantine, the person’s name and relation to the employee. For leave related to school closure or loss of childcare, the employer should obtain the employee’s statement that school or childcare is unavailable, the name and age of the child or children to be cared for, the name of the school or facility that is closed, a representation that no one else is providing care to the children during the time for which leave will be used; and if the child is 15 or older and leave is sought for daylight hours, a statement from the employee regarding what special circumstances exist requiring care during that time. August 9, 2021 update: While the IRS announced the addition of two additional reasons for leave (accompanying an individual to receive a vaccination or caring for an individual for post-vaccination illness, injury, or disability), it did not provide specific guidance on the documentation to maintain. Our Request Form manages employee expectations for documentation at the outset by requesting what the DOL and IRS have advised as required plus a few “extras” (requested documentation of isolation order, doctor’s instructions, and school/childcare closure, COVID-19 symptoms and onset, and condition based on any future coverage expansion by the Secretary of HHS). Many of these (isolation orders and school closure data) will be easily found with a modicum of internet sleuthing. September 16, 2020, update: An employee can only be required to provide notice of leave as soon as is practicable (for EFMLA) or on the first workday missed (for EPSL). Following notice (which will generally be verbal), an employer’s

request for supporting information cannot be used to delay the grant of leave, but an employee should provide it as soon as practicable. Employers must take care not to delay or deny leave if the above “extras” are not provided, and some employers may want to delete these references to ensure there is no confusion in the administration of these leaves. March 10, 2021 update: there are currently no guidelines on the information employers must or should maintain for the new leave reasons (post-exposure testing and immunization and post-immunization leave). We’ve taken a shot at what we think is reasonable and responsible for stewardship of government resources, but please expect this form to change slightly if the DOL or IRS issue specific guidance.

The second page of this form permits the employee to request the application of available and accrued leave to any unpaid or partially paid leave portion. This portion is not required. If you believe it will be too confusing to your workforce, you may delete it. You should retain the signature portion beginning with “*I understand...*”

March 10, 2021 update: The American Rescue Plan Act of 2021 eliminated the 10 day unpaid waiting period at the start of the EFMLA.

Notice of Designation of Requested Leave for Emergency Paid Sick Leave:

This Designation Notice is for Emergency Paid Sick Leave only; it combines elements of an FMLA Eligibility and Designation form to reduce paperwork for this form of leave. If an employee is approved to use Emergency Paid Sick Leave, you should check the boxes under that bold heading accordingly, including the underlined subparts. Under this heading you will also use the checkboxes to communicate with employees about using this leave intermittently or on a reduced schedule; the employee’s hourly entitlement; and the calculation of wage rate to be used during this leave. If you still need documentation from the employee, you would pick the second bold heading indicating that and draft a short request based on the information from the Request Form that has not been provided. If the Emergency Paid Sick Leave is to be denied, you would select the third bold heading and the reason for denial. In its April 1 temporary rule, the DOL included instructions for small employers of under 50 employees for whom providing school and childcare-closure related leave would jeopardize the business as a going concern. Our [Breaking News for April 2](#) describes the three bases on which an employer can make this determination (essentially, that the leave would be too expensive, that the employee is too critical (even if not a key employee), or that the job cannot be covered). Currently, you are not required to identify which of the three reasons is in play on the denial to the employee, but you must document the reason and preserve it in your records for DOL.

Notice of FMLA Eligibility and Rights & Responsibilities for Emergency FMLA Expansion Leave:

Because the Emergency FMLA (EFMLA) leave comes out of an employee’s overall 12-week leave entitlement, we believe it is important to provide separate eligibility and designation notices specific to EFMLA and not composite response notices. This eligibility notice, just as a traditional FMLA eligibility notice, only lets the employee know if they meet the requirements of eligibility. A recommendation: under the Rights and

Responsibilities section, we suggest that consistent with standard FMLA practices, you seek confirmation of status and intent to return to work at intervals of 30 days or longer. For employees working on a reduced schedule (e.g., Monday, Wednesday, Friday), such reports may be completely unnecessary. In its April 1 temporary rule, the DOL included instructions for small employers of under 50 employees for whom providing school and childcare-closure related leave would jeopardize the business as a going concern. Our Breaking News for April 2 describes the three bases on which an employer can make this determination (essentially, that the leave would be too expensive, that the employee is too critical (even if not a key employee), or that the job cannot be covered). Currently, you are not required to identify which of the three reasons is in play on the denial to the employee, but you must document the reason and preserve it in your records for DOL. The DOL's temporary rule also includes the key employee exception as it exists in traditional FMLA. Please note that the key employee definition and application can be tricky, and only select this if you are experienced with the technical legal definition or in consultation with legal counsel.

Notice of Designation of Requested Leave As Emergency FMLA Expansion Leave:

If an employee is approved to use EFMLA, you should check the boxes under that bold heading accordingly, including the underlined subparts. Under this heading you will also use the checkboxes to communicate with employees about using this leave intermittently or on a reduced schedule; the employee's hourly entitlement; the calculation of wage rate to be used during this leave; and the application of any gap-filling paid leave. April 17, 2020, and March 10, 2021 revisions: On April 10, 2020, the DOL substantially revised the FFCRA regulations to provide that employers could require supplementation by employer-provided paid leaves during partially paid EFMLA. The leaves the employer may substitute during partially-paid EFMLA are only those leaves which an employee could use for the purpose at hand (e.g., loss of childcare – though as of April 1, 2021, this is no longer the only qualifying reason for EFMLA). For most employers, this will include vacation, generally-available PTO, and some family leaves, but may exclude sick leave in some circumstances. The designation form (and language in the leave request form) reflect this option.

If you still need documentation from the employee, you would pick the second bold heading indicating that and draft a short request consistent with the applicable checkbox. If the EFMLA is to be denied, you would select the third bold heading and the reason for denial.

## **Conclusion**

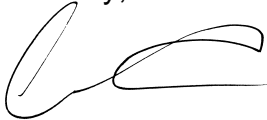
On March 26, 2020, the DOL made public [a Field Assistance Bulletin](#) instructing its enforcement officers not to bring enforcement actions against employers trying, in good faith, to comply with the FFCRA. Accordingly, lean on legal counsel during this time and remain flexible as we all adapt to a new normal.

While leaves are now voluntary for employers to provide, if employers use these leave programs to seek tax credits, they will still need to substantially comply with the leave

programs as they did when the FFCRA was a mandate of law. This means employers should obtain information about the need for leaves, and that leaves should be available to any qualifying employee (except for small employer exceptions). Further, the American Rescue Plan Act of 2021 provides that these leaves may not be provided in a way that discriminates in favor of highly compensated employees, full-time employees, or longer tenured employees.

We are here to answer any questions.

Sincerely,



Albert L. Vreeland  
FOR THE FIRM



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