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**Updated September 16, 2020**

**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, when the U.S. House of Representatives passed the first draft of the Families First Coronavirus Response Act (FFCRA). Thank you for joining us on what has been a wild ride of amendments/corrections and new guidance from the Department of Labor (DOL) almost every day.

The FFCRA became effective on April 1, 2020. DOL published a temporary rule on the afternoon of April 1 explaining what types of information employers should collect. This information should be retained for four years. It did not publish any model forms.

To fill that void, please find enclosed model policy language as well as four model forms. 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 April 17, 2020. 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:** As described in our March 27 update in our Breaking News section, the DOL has opined that the employer has the option to provide school-closure/childcare-loss related leave on an intermittent basis. 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. 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.*

### **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. The April 1 temporary rule instructs the employer to 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. 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). 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. Many of these (isolation orders and school closure data) will be easily found with a modicum of internet sleuthing.

The second page of this form permits the employee to request the application of available and accrued leave to any unpaid leave portion (e.g., the first ten days of Emergency FMLA if EPSL does not apply) 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...*"

### 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 revision: On April 10, 2020, the DOL substantially revised the FFCRA regulations to provide that employers could not require supplementation by employer-provided paid leaves in the first two weeks of EFMLA but could require

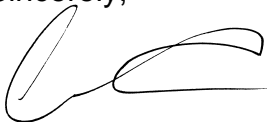
supplementation by employer-provided paid leaves during the partially paid portion (weeks 3-12) of EFMLA. If the first two weeks of EFMLA are to be paid, whether by EPSL or employer-provided paid leave, that must be at the employee's request (and the employer should not deny it provided the leave requested to be applied is one that could be used for the purpose of childcare). Employers should not require employees to supplement paid EPSL (whether used during the first two weeks of EFMLA or independently). The leaves the employer may substitute during weeks 3-12 of the EFMLA are only those leaves which an employee could use for the purpose at hand (i.e., loss of childcare). For most employers, this will include vacation, generally-available PTO, and some family leaves, but will exclude sick leave. 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.

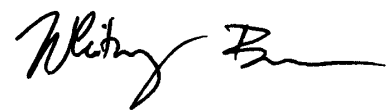
### **Conclusion**

On March 26, 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. We are here to answer any questions.

Sincerely,



Albert L. Vreeland  
FOR THE FIRM



Whitney R. Brown  
FOR THE FIRM