

MARR JONES & WANG

A LIMITED LIABILITY LAW PARTNERSHIP

Labor and Employment Law

Families First Coronavirus Response Act (FFCRA) and Coronavirus Aid, Relief, and Economic Security (CARES) Act

Update as of April 6, 2020, 8:15 a.m.

FFCRA and the CARES Act were drafted quickly, and whether intentional or not, employers need to be aware of crucial differences between the acts that affect employer coverage.

- **Employee Count:**
 - **FFCRA** looks to the number of employees the employer has **at the time the employee would take leave**. If the employer has fewer than 500 employees, then FFCRA applies. Depending on the type of leave, either existing Fair Labor Standards Act (FLSA) “joint employer” (Emergency Sick Leave) or existing Family and Medical Leave Act (FMLA) “integrated entity” (Emergency Family Leave) analysis and rules apply.
 - **CARES Act** presumptively uses the traditional Small Business Administration (SBA) test which is average number of employees in prior 12 months. In addition, CARES applies the SBA affiliation rules to determine whether the employer has fewer than 500 employees **per location** in order to be eligible for a loan under the Payroll Protection Program, but has exceptions for hotels and restaurants which allow them to only count the employees at a specific location for purposes of determining eligibility. Under the SBA affiliation rules, entities may be considered affiliates based on factors including stock ownership, overlapping management, and identity of interest. This is a fact-specific analysis.

- **Employees Who Count:**
 - **FFCRA** counts full-time and part-time employees, employees on leave of any kind, temporary employees, day laborers from temporary placement agencies, and jointly employed employees. FFCRA does not count independent contractors, employees who have been laid off or furloughed and have not been reemployed, and employees who are not employed in the United States.
 - **CARES Act** counts full-time and part-time employees, employees from temporary employment agencies, and employees of professional employee organizations (PEOs) or leased employees. The CARES Act requires the employees’ principal place of residence to be the United States.

- **Practice Pointers:**

- The fact that an employer is covered under one act does not necessarily mean the employer is covered under both acts. Employers should do a careful employee count to assess coverage under each Act before making any decisions regarding FFCRA or CARES Act. While Congress and/or the regulatory agencies may take actions to try to reconcile the differences between the Acts, that reconciliation has not taken place so far.
- Especially under FFCRA, although it expires on December 31, 2020, there may be long-term implications under the FLSA and FMLA (and potentially other acts), based on your method of counting who is an employee and your determination whether related entities are “joint employers” or “integrated employers.”
- Because FFCRA includes a private right of action against companies with more than 50 and fewer than 500 employees, we anticipate possible class action lawsuits and other litigation in the future. Consider the potential for future claims (including class action claims) when making decisions about whether to grant benefits under FFCRA, especially in the many situations where the statute and regulations are not entirely clear.

Please contact us if you have questions or need assistance.