DO I MAKE FRINGE BENEFIT CONTRIBUTIONS FOR UNION EMPLOYEES?
UNDER FFCRA PAID SICK LEAVE OR FMLA LEAVE?

We have received countless inquiries about whether union contractors must make fringe benefit fund contributions on behalf of employees out on paid sick leave or paid family and medical leave under the Families First Coronavirus Response Act (FFCRA). There’s a great deal of uncertainty, confusion, and contradictory information out there. This is a fluid situation, with the Department of Labor putting out new guidance almost daily and new regulations just yesterday, so no one is completely sure of the answer, but below is our outline of how we think union contractors should approach this. Please note that nothing said here should be considered legal advice and that you should always consult your own employment lawyer to advise you about the best course of action under your circumstances.

How to Determine Whether You Must Make Fringe Benefit Fund Contributions for Employees on FFCRA-Covered Leave?

- First look at the CBA to determine whether it requires you to make fringe benefit contributions made based on hours worked (most common) or hours paid.
  - If the CBA says employers must make benefit fund contributions based on hours worked, you do not have a contractual obligation to make contributions. You also do not have any legal obligations to make contributions into any funds except possibly health-and-welfare funds. Your obligation to make contributions to health-and-welfare funds is less clear and depends on various factors:
    - Regulations implementing FFCRA released by the Department of Labor on April 1 expressly require employers to continue group health plan coverage for employees on either type of FFCRA leave (sick leave or family and medical leave) on the same conditions that would have been provided if the employee had been continuously employed during the entire leave period.
    - Neither the FFCRA itself nor the regulations expressly address an employer’s obligation to continue health-and-welfare fund contributions. However, regulations under the regular Family and Medical Leave Act (FMLA) require that “an employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.” That requirement presumably applies to employees taking paid family and medical leave under FFCRA. So, you may need to make contributions to health-and-welfare funds on behalf of employees taking...
emergency family and medical leave – i.e., if the plan does not contain “an explicit FMLA provision for maintaining coverage” – but not on behalf of employees taking emergency paid sick leave under FFCRA.

- If you have paid leave obligations under other laws, such as state or local laws and the federal contractor paid sick leave rule, then you must comply with those laws irrespective of the FFCRA.
  - If the CBA says employers must make benefit fund contributions based on hours paid, then there’s room for argument. If the CBA language says, “based on hours paid under the terms of this contract”, the employer can argue that leave hours are being paid under the FFCRA, and not under the CBA, therefore contributions are not required. If the contract language simply states “hours paid” the employer probably must make all benefit fund the contributions even though FFCRA doesn’t require it. We have heard that some unions are waiving this, but we are not aware of that being done by any of the unions affiliated with OCA. Also, keep in mind that the funds are joint labor-management entities separate from the unions, and their trustees have fiduciary obligations to seek unpaid contributions. OCA will continue to monitor the situation with our multi-employer funds and keep membership advised of any updates or changes.
  - Again, you must also be mindful of obligations under other paid leave laws, such as state or local laws and the federal contractor paid sick leave rule, which remain obligations irrespective of the FFCRA.

- Note that the Department of Labor has clarified that FFCRA does not require employers to provide paid leave (of either type) if the worksite closes and the employee is laid off (whether due to lack of business or due to government order), so the above will not apply to many construction workers.

- If you do have work available and have employees taking FFCRA-covered leave, keep in mind that the fully refundable tax credit is available and includes a credit for health plan expenses. So, if you are required to make health-and-welfare fund contributions or aren’t sure but want to err on the side of caution, you can make the contributions and claim the tax credit. If for any reason one or more of the union funds would reject your contributions made under the FFCRA leave provisions, please immediately notify the OCA.

I know it’s not clear and simple, and it’s subject to change, but we hope that the above helps.