

# The Families First Coronavirus Response Act

What does this mean for your  
business?

Chris Parker  
chris.parker@millermartin.com  
404-962-6456

Sarah Fay  
sarah.fay@millermartin.com  
404-962-6423

ATLANTA  
CHARLOTTE  
CHATTANOOGA  
NASHVILLE

# COVID-19



# The Caveats...

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- We are lawyers, however, nothing in this webinar is intended to create an attorney-client relationship nor should it be relied upon as legal advice.
- This discussion involves brand new amendments to existing laws that remain unclear.
- These new laws reference regulations that have yet to be created. Things are still in flux.
- Additional government funding measures are promised, but still in the works.

# A Little Background

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- The Family First Coronavirus Response Act (“FFCRA”) was first passed by the U.S. House of Representatives on Saturday, March 14, 2020.
- Just two days later, late in the evening on Saturday, March 14, 2020, the House passed “technical corrections” to the bill.
- The U.S. Senate approved the FFCRA on Wednesday, March 18, 2020 (without amendment).
- President Trump signed the FFCRA into law that same day, March 18, 2020.

This sweeping law was created in about *five days*.

# When Does This Become Reality?

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- The FFCRA is set to become effective on April 1, 2020.
- *Original date was April 2, 2020, but DOL has since announced it will use **April 1** as the start date.*
- *Regulations interpreting and advising on the law may lag weeks behind.*

# What Is the FFCRA?

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The overall intent of the law is to provide assistance to issues caused by the novel coronavirus pandemic.

For *employers*, the FFCRA includes amendments to the Family and Medical Leave Act (“FMLA”), which materially expands coverage and benefits under the FMLA relating to employee absences caused by COVID-19.

- More employers and employees are covered.
- **Paid** leave benefits may be required.

# FFCRA High Points



- Emergency Paid Sick Leave Act
  - Two weeks (ten days or 80 hours) of **paid** leave for employees who are unable to work (and unable to telework) due to certain reasons related to the COVID-19 outbreak, including:
    - Being subject to quarantine or isolation by government order;
    - Being advised to self-quarantine by a healthcare provider;
    - Experiencing symptoms of COVID-19 *and* seeking a diagnosis;
    - Caring for another individual subject to a quarantine or self-quarantine;
    - Caring for a child because schools are closed or the regular childcare is unavailable due to coronavirus precautions; and
    - Experiencing any other substantially similar condition as specified by certain cabinet secretaries (HHS, Treasury, Labor).

# FFCRA High Points



- Emergency Family and Medical Leave Expansion Act
  - **Twelve weeks** of job-protected paid family and medical leave for employees who are unable to work or telework so they can care for their own children if schools are closed or regular paid childcare is unavailable due to the coronavirus.
    - During the **first two weeks (ten days)** of this expanded FMLA leave, employees may use their accrued personal or sick leave (or the new Emergency Paid Sick Leave benefit described on the last slide). Otherwise the first ten days of expanded FMLA leave would be unpaid.
    - After the first two weeks (ten days) of leave, employees can receive **up to 10 additional weeks** of family and medical leave at two-thirds pay.



# What the FFCRA Covers

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- The FFCRA provides leave benefits when leave is needed **by the employee** for a qualifying reason.
- The FFCRA does **not** provide pay or leave because **an employer has decided** to cease or reduce operations.

If your business closes, you will not be saddled with the new leave provisions. Employees may be able to receive **unemployment compensation** on an expedited basis when they have experienced a reduction in hours.

# Do the FFCRA's Leave Requirements Apply to My Business?

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- Emergency Paid Sick Leave
  - Applies to all public employers
  - Applies to private employers of fewer than 500 employees
- Emergency Expanded FMLA Leave
  - Applies to all (non-federal) public employers
  - Applies to private employers of fewer than 500 employees

Note: The FFCRA's leave requirements do NOT apply to private employers of 500 or more employees.

# Potential Exceptions to Employer Coverage

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- Employers of fewer than 50 employees *may apply to the DOL for an exemption* from the leave requirements for childcare stemming from school closures *if* the new requirements would jeopardize the viability of the business as a growing concern.
- DOL Regulations are “expected” on this exemption in ***April 2020***.

# Do I Need to Pay My Absent Employee Under the FFCRA?



- If you are a covered business, you must provide leave under the FFCRA as follows:
  - **Two weeks (ten days)** of paid or partially paid leave for **all** employees (there is no requirement here for the employee to have worked 30 days) who are unable to work related to COVID-19, as follows:
    - Employees receive their **full wages (up to \$511 per day** or \$5110 in the aggregate) if the employee himself/herself is having COVID-19 symptoms or is subject to a quarantine order or healthcare directive.
    - Employees receive **two-thirds of their wages (up to \$200 per day** or \$2000 in the aggregate) if the leave is taken to care for another individual subject to a quarantine order or healthcare directive, or to care for the employee's child whose school or place of care has closed or whose paid regular childcare provider is unavailable due to COVID-19.

# Do I Need to Pay My Absent Employee Under the FFCRA?

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- **Ten additional weeks** of partially paid leave for employees **who have worked at least 30 days.**
  - Employees receive **two-thirds of their wages (up to \$200 per day** or \$10,000 in the aggregate) for leave taken to care for the employee's child whose school or place of care has closed or whose paid regular childcare provider is unavailable due to COVID-19.

# Potential Exceptions to Employee Coverage

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- Employers of certain employees (healthcare providers or emergency first responders) may elect to exclude such employees from the two weeks of paid sick leave provided by the FFCRA.
- The FFCRA also authorizes the DOL to issue regulations which exempt these types of employees from the expanded FMLA leave provision (the additional 10 weeks of partially paid leave).

# Qualifying Reasons for Leave:



Under the FFCRA, an employee qualifies for two weeks of *paid emergency sick leave* if the employee is unable to work (**or telework**) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or whose paid regular child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for ten additional weeks of expanded family and medical leave if the employee is unable to work (**or telework**) because the employee is caring for a child whose school or place of care is closed (or whose paid regular child care provider is unavailable) for reasons related to COVID-19.

# Putting the Pieces Together



- **Duration of Leave:**
  - **For reasons (1)-(4) and (6) – *the employee is ill, quarantined or caring for someone who is ill or quarantined*:** A full-time employee is eligible for two weeks (80 hours, or 10 eight-hour workdays) of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.
  - **For reason (5) – *caring for a child who has experienced a school or childcare closure*:** A full-time employee is eligible for up to 12 weeks of leave (two weeks of paid or partially paid sick leave followed by up to 10 weeks of partially paid expanded family & medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.



# So, How Much Does an Employer Have to Pay?

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The classic lawyer answer:  
*It depends.*

It depends on the reason for the leave, so we have to follow the bouncing ball....

# Calculation of Pay:

## The Most Generous Benefit – Employee Illness or Quarantine Order

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For paid sick leave relating to

- Governmental order to quarantine or isolate;
- Advice of a health care provider to self-quarantine for COVID-19; or
- COVID-19 symptoms and seeking a medical diagnosis,

employees taking ***their two weeks of paid leave*** are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a two-week period).

# Calculation of Pay:

## A Less Generous Benefit – Caring for Another Who Is Ill or Subject to Quarantine

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For paid sick leave relating to

- Caring for an individual subject to a government ordered or self-quarantine
- Caring for a child whose school or place of care has closed, or whose paid regular childcare provider is unavailable, due to COVID-19 precautions
- Experiencing any substantially similar circumstances to COVID-19

employees taking ***their two weeks of paid leave*** are entitled to pay at the higher of 2/3 their regular rate or 2/3 the applicable minimum wage, up to \$200 per day and \$2,000 in the aggregate (over a two-week period).

# Calculation of Pay:

## The Longer Duration Benefit – Caring for a Child Due to School/Childcare Closure

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For leave relating to

- Caring for a child whose school or place of care has closed, or whose paid regular childcare provider is unavailable, due to COVID-19 precautions,

(1) employees taking ***their two weeks of paid sick leave*** are entitled to pay at the higher of 2/3 their regular rate or 2/3 the applicable minimum wage, up to \$200 per day or \$2,000 in the aggregate (over a two-week period); and

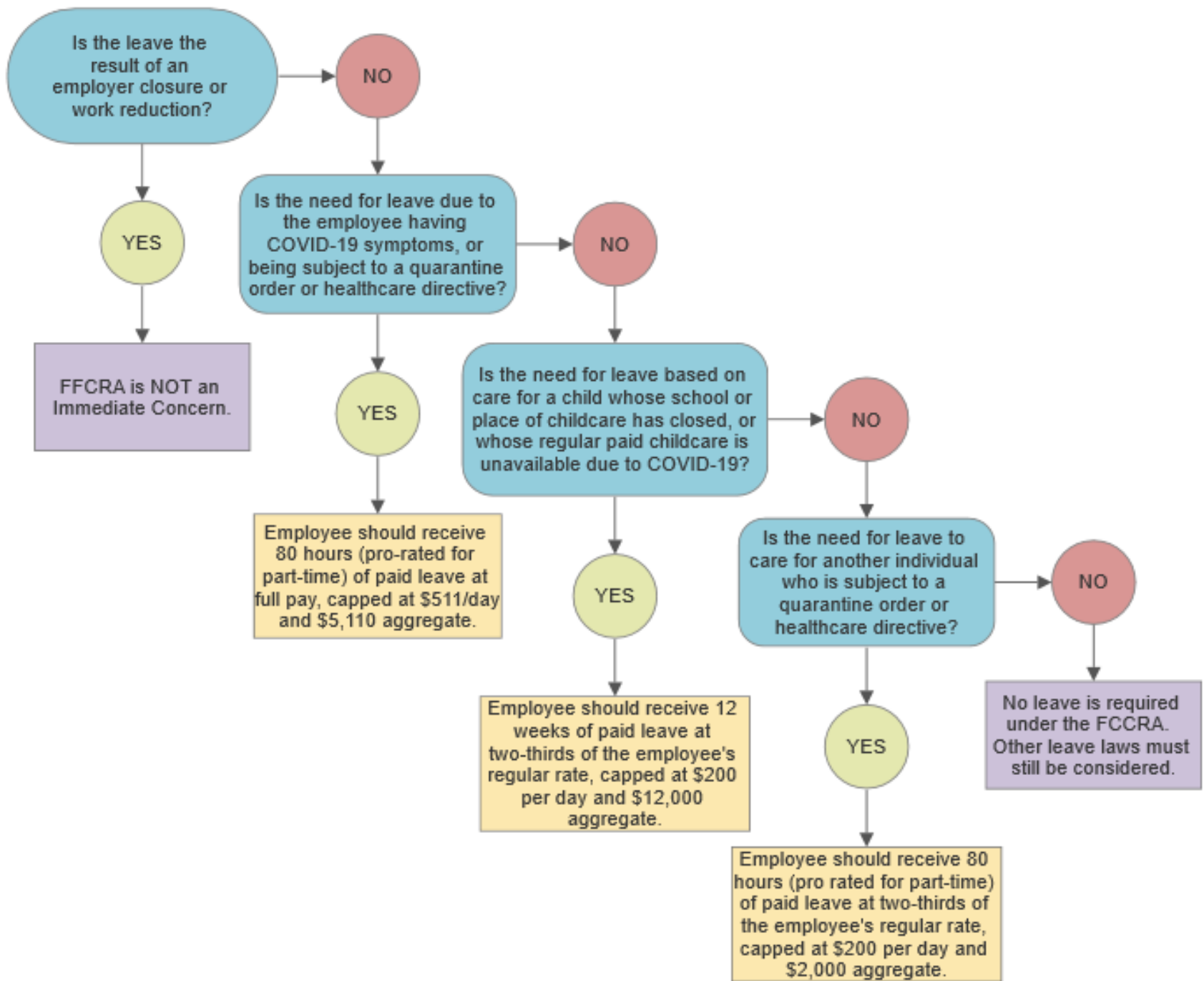
(2) employees taking their **ten additional weeks of additional expanded paid FMLA leave** are entitled to pay at the higher of 2/3 their regular rate or 2/3 the applicable minimum wage, up to \$200 per day or \$10,000 in the aggregate (over a ten-week period).

# Say What?

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- For those of us who are graphic learners, how about we try a flow chart approach...



# How Am I Supposed to Pay for This?

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Relax, the government is here to help...

# 100% Reimbursement for Paid Leave

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- Per March 20, 2020 IRS Press Release:
  - Employers retain an amount of payroll taxes due equal to the amount of qualifying leave they paid, rather than deposit them with the IRS.
  - Includes employer's retention of the following taxes:
    - Federal income tax withholdings;
    - Employee share of Social Security and Medicare taxes; and
    - Employer share of Social Security and Medicare taxes.



# More Details on the Credit

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- Health insurance costs are included in the credit.
- Employers face no payroll tax liability on the paid leave benefits.
- Self-employed individuals receive an equivalent tax credit that reduces their estimated tax payments.
- ***If there are insufficient payroll taxes to cover the leave costs to an employer, the IRS will “promptly” issue a refund for the difference.***

# Other Help

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- The FFCRA authorizes a temporary 6.2% increase in federal Medicaid funds to states and territories.
  - States cannot increase eligibility requirements or premium amounts over January 1, 2020 standards.
  - Coverage cannot impose cost-sharing for COVID-19 diagnostics or treatment.
- Personal respiratory devices (think, “masks”) are considered covered countermeasures (providing liability limitations for manufacturers).

# Unemployment Compensation

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- Workers who suffer a reduction in hours may apply for unemployment benefits.
  - Most states are suspending the waiting period after a layoff or reduction in hours before workers (or employers) can submit applications for unemployment benefits.
  - Most states are waiving any in-person application requirements.
  - Many states are waiving work search attestation requirements.
  - Many states are rolling out procedures for mass claims or lists to be filed by employers, which simplifies the process for both employees and employers affected by COVID-19.

# Unemployment Compensation and the Stimulus

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The new stimulus package appear to be providing States with an additional **\$600 per week** to pass through to individuals would otherwise receive from the State

*For example, if an employee would normally be eligible for a maximum benefit of \$362 per week, they may now receive \$962 per week*

# Georgia Unemployment Changes

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- **Georgia Employers BE AWARE** – Georgia has imposed a new employer filing requirement for employers who are temporarily reducing work hours or where there is no work available for a short period due to COVID-19.
- Employers who fail to comply with this requirement **will be required to reimburse the Georgia Department of Labor for the full amount of unemployment benefits paid to these employees.**

# Forget the Future, We Have a Problem Right Now

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Tax-Qualified Defined Contribution Retirement Plans (such as a 401(k) plans):

- To alleviate cash flow issues, employers may reduce or eliminate *discretionary* contributions.
  - No amendments are necessary for *discretionary* contributions.
  - If plan requires *mandatory* contributions, an amendment to the plan must be made.

# More on 401(k)

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- Safe harbor match or nonelective contributions require more analysis.

***Consult your benefits professional before changing plans relating to safe harbor contributions.***

# Health Plan Issues

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- Pay attention to reductions in work schedules:
  - Reductions in hours may cause a loss in coverage – a “qualifying event” triggering COBRA.
  - Consider waiving eligibility criteria or amending plan to allow for reduced schedules.
    - Consult with insurers and stop loss carriers before making changes.



# Health Plan Issues (continued)

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- The FFCRA requires group health plans to provide coverage for COVID-19 diagnostic testing products and services.
  - **No cost sharing is allowed.**
  - Payroll tax credits include employer expenses to maintain coverage for employees on leave.

# Possible Exemption for Small Business

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- For employers with less than 50 employees, the DOL will provide guidance on exemption ***from the leave requirements relating to school closings or childcare unavailability*** where the leave requirements would jeopardize the ability of the business to continue.
- The exemption is to be determined based on “simple and clear criteria.”

# The New Law Takes an Immediate “Vacation”

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- The DOL will be issuing guidance on a temporary (30-day) period of non-enforcement that will apply as long as the business has acted reasonably and in good faith to comply with the FFCRA.

# Business Strategy: Things You Should Be Doing Now

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***Get on the front foot*** - identify your company's pressure points and deploy available resources to mitigate potential adverse exposure

1. Conduct internal due diligence
2. Manage cash flow
3. Communicate with stakeholders
4. Implement or update your mitigation and recovery plans

# Conduct Internal Due Diligence

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- Material Contracts
  - Termination Rights
  - Material Adverse Change clauses
  - Force Majeure clauses
  - Payment terms
  - Penalties and SLAs
  - Key contacts and employees
  - ???
- Key Personnel
- Risk Areas
  - Customers
  - Vendors
  - Suppliers
  - ???

# Christopher E. Parker

## Atlanta

P: 404.962.6456 | F: 404.962.6356



### PRACTICE AREAS

Business Litigation  
Healthcare Litigation  
Labor & Employment  
Employment Litigation  
Wage & Hour  
Life Sciences  
Construction

### BAR ADMISSIONS

Georgia

### EDUCATION

J.D., The Moritz College of Law, Ohio State University  
B.S., Ohio State University

Chris represents clients in the retail, healthcare, manufacturing, service, entertainment, hospitality, pharmaceutical and insurance industries, as well as local government bodies, focusing his practice on the representation and counseling of business stakeholders in matters pertaining to the workplace and the protection of their intellectual property and trade secrets. Chris has handled a wide variety of disputes ranging from multi-party and class action claims to single-plaintiff cases on subjects as diverse as professional malpractice to ERISA to product defect claims. Many clients entrust Chris to help keep them out of the courtroom but have come to realize that if a case needs to be tried, Chris and his team will work hard to achieve a favorable result.

Chris is also trained as a mediator and frequently serves as a third-party neutral. He has represented private and public employers before the National Labor Relations Board, Equal Employment Opportunity Commission, Department of Labor, Department of Justice, federal and state trial and appellate courts, as well as numerous state administrative agencies. As a trusted partner, Chris assists several clients as their external or supplemental general counsel.

Chris successfully defended one of the first lawsuits to be filed under the Americans with Disabilities Act (ADA) and served as successful lead trial counsel in one of the first cases to be tried under the Family and Medical Leave Act (FMLA). He has served as lead counsel in class actions and numerous multi-party cases. In 2014, Chris led a trial team that achieved one of the top verdicts in Georgia in a case seeking redress for violation of Georgia's Trade Secrets Act and breaches of fiduciary duties.

Chris is a member of the firm's Policy Committee and previously served as the Managing Member of the Atlanta office of Miller & Martin. Chris is a frequent author and speaker before a variety of continuing legal education and business audiences and generally focuses his remarks on practical solutions and strategies, occasionally sprinkled with some humor and commentary on the many situations life seems to present.

# Sarah Fay

## Atlanta

**P: 404.962.6423 | F: 404.962.6321**



### **PRACTICE AREAS**

Corporate

Mergers & Acquisitions and Private  
Equity

International/World Law Group

### **BAR ADMISSIONS**

Georgia

### **EDUCATION**

Graduate Diploma of Legal Practice,  
College of Law, 2014

Bachelor of Laws, The University of  
Western Australia, 2014

Bachelor of Arts, The University of  
Western Australia, 2014

Sarah Fay focuses her practice on mergers and acquisitions (public and private), equity capital markets, capital raisings, general corporate and commercial advisory work. Ms. Fay has a broad range of domestic and cross-border experience in industries ranging from technology, insurance, agribusiness, healthcare and resources.



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# Open for Questions and Discussion

**Chris Parker**

**[chris.parker@millermartin.com](mailto:chris.parker@millermartin.com)**

**404.962.6456**

**Sarah Fay**

**[sarah.fay@millermartin.com](mailto:sarah.fay@millermartin.com)**

**404.962.6423**