

COMPLIANCE UPDATE: COVID-19

President Signs Families First Coronavirus Response Act

The President signed the Families First Coronavirus Response Act into law on March 18, 2020. Provisions include a new paid FMLA right, paid sick leave, and a group health plan mandate requiring coverage for certain COVID-19 (Coronavirus) related medical services. Below is a summary of key provisions that impact employers.

Emergency Family & Medical Leave Expansion Act

Effective Date

The law will go into effect on April 2, 2020 and expire on December 31, 2020.

Covered Employer

The Act applies to private employers with fewer than 500 employees, but does not address how the 500-employee threshold is counted. Like existing FMLA, the Act applies to governmental entities (regardless of the number of employees). The law allows the Secretary of Labor to exempt small businesses with fewer than 50 employees if providing the emergency FMLA leave will jeopardize their businesses as a going concern.

Eligible Employee

Employees who have worked for the employer for 30 calendar days prior to the emergency FMLA leave are eligible. The Secretary of Labor may exempt healthcare providers and emergency responders from those eligible for the leave.

Comment: The Act expands FMLA to employers previously not subject to the Act and allows employees to be eligible before meeting the one-year employment and 1,250 hours requirement under current FMLA.

Reason for and Duration of the FMLA Leave

Eligible employees may take up to 12 weeks of job-protected FMLA leave for "qualifying leave related to a public health emergency." This is limited to when the employee is unable to work or telework due to the need for leave to care for the employee's child because the child's (1) school is closed, or (2) place of care is closed, or the child care provider is unavailable because of the public health emergency.

Child care provider is defined as a provider who receives compensation to provide child care services on a regular basis, and school is defined as an elementary school or secondary school.

Comment: This is now the only qualifying reason for the emergency FMLA leave and a major change from the previous bill, which allowed FMLA leave for illness from and exposure to COVID-19. Remember that existing FMLA language provides coverage for an employee's own serious health condition, or for the employee's need to care for a family member's serious health condition, which could apply to those affected by COVID-19.

How Much Pay is Required for this Emergency FMLA Leave?

For the first ten days of leave, the emergency FMLA leave is unpaid. During this time an employee may elect to use any accrued paid leave, such as vacation, sick leave, or paid time off and may use the emergency paid sick leave outlined below.

For the remaining ten weeks of leave, full-time employees are paid at 2/3 of their regular rate of pay for the number of hours they are normally scheduled to work.

For employees who are part-time or who work irregular schedules, they must be paid based on the average number of hours scheduled to work in the previous six months. If an employee has not worked for six months, the employee must be paid based upon the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

Comment: Importantly, the Act limits the amount an employer must pay for this leave to \$200 per day and \$10,000 in the aggregate.

Job Restoration Upon Return From Emergency FMLA Leave

Emergency FMLA leave is job protected, meaning employers must return an employee to the same or to an equivalent position upon return to work. However, the Act exempts employers with fewer than 25 employees from this requirement if:

1. The employee's position no longer exists because of economic conditions or the employer's operating conditions that affect employment and are caused by a public health emergency;
2. The employer makes reasonable efforts to restore the employee to an equivalent position; and
3. If the employee is not restored to an equivalent position, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for one year following the expiration of the employee's emergency FMLA leave.

Benefit Continuation During Emergency FMLA Leave

The Act does not address whether or how benefits must be continued during the new FMLA leave, so current FMLA requirements will apply.

Emergency Paid Sick Leave Act

Effective Date

The law will go into effect on April 2, 2020 and expire on December 31, 2020.

Covered Employer

The Act defines an employer that is subject to the Act as:

- A private employer with fewer than 500 employees;
- Governmental entities; and
- Any other entity that is not a private entity with more than one employee. (Please note that this likely means quasi-governmental agencies but the language is not clear.)

Eligible Employee

An employee is immediately eligible for paid sick leave with no requirement to have worked a certain period of time.

Reasons for Emergency Paid Sick Leave

This sick leave is available in only certain circumstances. An employer shall provide the sick leave to the extent an employee is unable to work or telework due to a need for leave because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is having symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. The employee is caring for a child whose school or care provider is closed, or is unavailable due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. This provision gives these agencies the option of designating other reasons for this sick leave in the future.

Employers of health care providers and emergency responders may elect to not allow these employees to be eligible for this sick leave.

Comment: An employer may not require an employee to use other paid leave before the employee uses this emergency paid sick leave. The Department of Labor is to provide a model notice for employers to post where their employment notices are usually posted. The term individual is a broader term than that used in the original bill, which was limited to family members.

Length of Required Sick Leave

Full-time employees are eligible for 80 hours of paid sick leave at the employee's regular rate of pay or the minimum wage, whichever is greater. When caring for another person or child (or for circumstances specified by the Secretary of Labor) in numbers 4-6 above, the rate is 2/3 of their regular rate of pay.

Part-time employees receive the number of hours the employee worked, on average, in the previous two weeks.

If an hourly employee's schedule varies, the employee's paid sick leave rate should equal the average number of hours scheduled to work in the previous six months. Employees who have been working less than six months are entitled to their reasonable expectation at the time of hiring of the average number of hours per day the employee would normally be scheduled to work.

Comment: One change from the prior legislation is that paid sick leave wages are capped at \$511 per day, up to \$5,110 in total, per employee for the employee's own use. When the sick leave is used for reasons 4-6 above, paid sick leave wages are capped at \$200 per day, up to \$2,000 in total. The sick leave does not carry over to the following year. The employer cannot require the employee to use accrued leave under the employer's policy first.

Employer Tax Credits for Emergency FMLA Leave and Sick Leave

Employers receive a refundable tax credit of 100% of the qualified sick leave wages paid and for the qualified FMLA wages paid under the Act for each calendar quarter through the end of 2020. These tax credits are against the employer's portion of Social Security taxes.

As covered above, the qualified FMLA wages are capped at \$200 per day for each employee up to \$10,000 for all calendar quarters. The qualified sick leave wages are capped at \$511 per day (\$200 per day if leave is to care for a family member or child), for up to 10 days per employee in each calendar quarter.

The credits will be increased to include amounts employers pay for the employee's health plan coverage while they are on leave. Specifically, the bill allows for the credit amounts to be increased by the amount of the employer's group health plan expenses that are "properly allocated" to the qualified emergency leave and sick leave wages.

Expanded Coverage for COVID-19 Testing

Fully insured, self-insured, and grandfathered group health plans will be required to provide full coverage of certain items and services at no cost to plan participants and without application of any medical management requirements, such as prior authorization or utilization review. This mandate is in effect immediately with respect to items furnished on or after the date of enactment. Plans must provide:

- In vitro COVID-19 diagnostic testing cleared or authorized by the FDA, including costs of administration; and
- Items and services furnished to an individual during a health care provider visit (including telemedicine), urgent care center visit, and emergency room visit that result in an order for COVID-19 testing.

Next Steps for Employers

- Determine whether the new FMLA leave and sick leave mandates apply to your company.
- Coordinate with your third-party FMLA leave administrators, if any, and ensure that they will be implementing the new FMLA emergency leave. Begin reviewing and updating FMLA policies to reflect the new emergency FMLA leave.
- Develop communications to your employees explaining the new FMLA and sick leave benefits.
- Update your sick leave policies to include the new mandated paid sick leave. Watch for the Department of Labor notice that is to be provided within seven days of the enactment of the law.
- Coordinate with your third-party administrators (TPAs) or insurers to ensure that the expanded coverage requirements of the Act are being administered correctly.
- For self-funded plans, stop-loss policies often have notice requirements that apply when the plan terms are changed, so notify your carrier of any changes in coverage and benefits.
- Watch for future guidance regarding the new tax credit and work with payroll on how to calculate and claim tax credits.
- Note that regulations will be issued by the Department of Labor and will answer questions not addressed by the Act.

This alert is intended to provide general information on employee benefits issues. It should not be construed as legal or tax advice and you should seek legal advice for application of this information to your specific circumstances.