

Guidance for Employers for Compliance with Families First Coronavirus Act

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Susan Richards Salen, Esq.
Rees Broome PC
(703) 790-6240
ssalen@reesbroome.com

President Trump signed the “Families First Coronavirus Response Act” (the “Act”) on March 18, 2020. The Act becomes effective on April 1, 2020 and expires on December 31, 2020. This comprehensive legislation requires employers with less than 500 employees to provide employees with paid Family Medical Leave Act Leave for qualifying needs related to a public health emergency and paid sick leave for certain leave necessitated due to a public health emergency (COVID-19). The Act also provides for tax credits to employers that are required to provide additional paid leave under the Act. Finally, the Act provides for expanded unemployment insurance benefits.

Updated March 25, 2020: Department of Labor (DOL) has issued its first guidance. See Rees Broome, PC’s DOL Guidance Alert issued on March 25, 2020.

Updated March 25, 2020: DOL has indicated that the effective date is April 1, 2020. It applies to leave taken between April 1, 2020 and December 31, 2020.

See:

[https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave;](https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave)
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Expanded FMLA Act

Updated March 25, 2020

When is the Act effective?

The Act is in effect from April 1, 2020 to December 31, 2020. However, the Department of Treasury and Internal Revenue Service have issued regulations that makes the tax credits available for employers who pay prior to the effective date.

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The DOL has indicated that it will give employers who are acting reasonably and good faith, and who make employees whole room to become compliant with the requirements of the Act Department of Labor for a period of 30 days after its effective date (April 2, 2020).

From DOL Guidance:

The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

Effect on other provisions of the FMLA?

The Act **does not** change the provisions of the FMLA relative to leave for serious health conditions whatsoever.

What does the Act provide?

The Act creates a new leave category for a qualifying need related to a public health emergency. A public health emergency means an emergency with respect to COVID-19 **declared** by a Federal, State, or local authority. A qualifying need exists when an employee is unable to work **or telework** due to a need to care for a son or daughter (under the age of 18 years) because the child’s school (elementary or secondary) or place of child care (paid child care) has been closed, or the child care provider for the employee’s child is unavailable, due to a public health emergency.

What employers must provide public emergency FMLA Leave?

An employer who employs less than 500 employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year must provide FMLA leave to an eligible employee who has a qualifying need related to a public health emergency. The Secretary of Labor has been granted the right to exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern (or profitable business), however, such regulations have not yet been enacted.

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There is still no regulation published on exemptions to the requirements. All employers with less than 500 employees must comply with the Act.

What employees are eligible for public emergency FMLA Leave?

Any employee who has worked for a covered employer for 30 calendar days.

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All employees without regard to amount of time worked for the employer are entitled to up to 80 hours of paid time off at their regular rate¹ of pay due to:

- Employee's inability to work because the employee is quarantined (pursuant to Federal, State, or local government order *or advice of a health care provider*), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Employee's inability to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

Example #1

A full-time employee, who has worked less than 30 days is unable to telework and no longer has childcare for her 7 year old child because the school is closed and the daycare has closed. This employee will be entitled to up to 80 hours of paid time off at her regular rate of pay to take care of her child. After the expiration of the 80 hours of paid time off, if the employee has not yet worked 30 days, the employee would not be entitled to take the expanded family medical leave act with 2/3rds of pay.

Example #2

Same scenario as example #1 but employee has worked at least 30 days. This employee would be entitled to receive an additional 10 weeks of paid and protected leave. The pay is at 2/3rds of employee's regular rate of pay.

Example #3

A full-time employee, who has worked less than 30 days provides a doctor's note that indicates that the employee is unable to work in the office due to his concerns of her risk for exposure to Coronavirus. The employee is entitled to 80 hours of paid time off. After the exhaustion of the 80 hours, the employee can stay out of work using her accrued unused PTO, if any, or the employer can grant leave without pay.

¹ Regular rate of pay is calculated by looking at 6 months prior to taking leave and includes overtime pay, non-discretionary bonuses and other amounts included in regular rate of pay determination.

Care should be taken regarding decisions to terminate employment in any of these scenarios.

[Do employees have to provide notice or complete a request for public emergency FMLA leave?](#)

Employees are required to provide as much notice of the need for the leave as is practicable. Employees do not have to complete a certification.

[Is the leave paid or unpaid?](#)

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Unlike the existing provisions of the FMLA, where the employer can require that the employee first exhaust all paid leave available, the Emergency FMLA Expansion Act eliminates this employer right.

The first 10 days of public emergency FMLA leave is paid under the provisions of the Act as paid sick leave. This leave is available to all employees without regard to the amount of time employed with the employer, if the employee is unable to work because the employee must care for a son or daughter due childcare unavailability or school closure.

After the first 10 days of leave, additional leave becomes paid leave. A covered employer is required to pay at least 2/3rds of the employee's regular rate of pay (as defined under the Fair Labor Standards Act) for the same number of hours the employee would otherwise be normally scheduled to work, capped at \$200 per day and \$10,000 in the aggregate. After the cap and aggregate amount has been reached, leave is unpaid (or other paid leave is substituted).

The amount of leave available is 12 weeks of leave total.

[Other than paid leave, does the employee have a right to paid group health plan premiums and job restoration benefits?](#)

The Emergency FMLA Expansion Act did not change the existing requirements that the employer pay group health care premiums and provide job restoration rights. However, employers who employ less than 25 employees and who meet other conditions may not have to provide job restoration rights. Essentially, the Act created a carve-out for small businesses that are forced to eliminate positions due to a public health emergency during the employee's period of leave.

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No regulations have been issued yet for this exemption. Accordingly, employers should assume that there is no exemption for them.

Notice Posting and Policy Requirements

Employers must amend existing FMLA notices to add this leave or promulgate an FMLA notice if they have not previously been covered by the FMLA.

Updated March 25, 2020

DOL will issue the model notice on March 25, 2020.

Tax Credits

Employers are entitled to a tax credit for amounts paid. See the third section of this article below for an explanation of the tax credits for Expanded FMLA.

Caveats:

- It is not clear if public emergency FMLA leave is reduced by other FMLA leave already taken during the 12-month period.
- The Department of Labor has the authority to issue regulations that exclude health care providers and emergency responders from the definition of eligible employees.
- The Department of Labor has the authority to exempt small businesses with fewer than 50 employees from the requirements of the Act if “the imposition of the requirements would jeopardize the viability of the business as a going concern.”
- The Department of Labor has authority to issue regulations to exempt employers with fewer than 25 employees who meet other conditions from the requirement to offer job reinstatement.

This guidance will be updated as circumstances dictate.

UPDATED March 25, 2020 Emergency Paid Sick Leave Act

The Act goes into effect April 1, 2020 and expires on December 31, 2020.

Who is covered by the Act?

An employer (who is engaged in commerce or in an industry or activity affecting commerce) with fewer than 500 employees is required to give all employees (without regard to length of employment) paid sick leave.

What employees are eligible to use emergency paid sick leave?

Any employee (as defined under the Fair Labor Standards Act), who is employed by an employer (defined above) at the time the leave is requested and has a qualifying reason is eligible for the paid leave. There is no amount of time that the employee must be employed before taking the leave described under this section; the leave is immediately available.

When and under what circumstances can an employee use emergency paid sick leave?

An employee can use emergency paid sick leave if the employee is unable to work **or telework** due to the following 6 reasons:

- (1) Employee is subject to a Federal, state or local quarantine or isolation order related to COVID-19.
- (2) Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (3) Employee is experiencing symptoms of COVID-19 **and** is seeking a medical diagnosis.
- (4) Employee is caring for an individual subject to an order described in (1) above or has been advised as described in (2) above.
- (5) Employee is caring for son or daughter of such employee if the school or child care of son or daughter has been closed or is unavailable due to COVID-19 precautions.
- (6) Employee is experiencing any other substantially similar condition specified by Secretary of Health and Human Services (in consultation with Secretary of Treasury and Secretary of Labor).

The insertion of the words “or telework” into the Act limits the employer’s requirement to pay emergency paid sick time. Thus, if an employee, who is subject to a government quarantine or isolation order can telework while under the order, the employee is not entitled to the paid sick leave.

How much does employer have to pay?

An employer is required to pay 80 hours of paid sick leave for full-time employees. Part-time employees’ leave is pro-rated and is calculated by averaging the number of hours an employee works over a 2-week period. For example, if the employee works 20 hours in week 1 and 20 hours in week 2, the employee would receive 40 hours of sick leave.

However, the amount that an employee is paid for the sick leave differs based upon the reason for taking the leave. In addition, the amount of leave to be paid is capped and limited as follows:

For reasons (1), (2), and (3) above, leave is paid at the employee’s regular rate of pay (as calculated under FLSA), capped at \$511 per day and \$5,110 in aggregate. This means that an employer does not have to pay more than \$511 per day and more than \$5,110 total to any employee taking the leave.

For reasons (4), (5), and (6) leave is paid at 2/3rds of the employee's regular rate of pay, capped at \$200 per day and \$2,000 in the aggregate. This means that the employer does not have to pay more than \$200 per day and more than \$2,000 total to any employee taking the leave.

May the employer impose accrual requirements on the emergency paid sick leave or make the employee exhaust other available paid leave benefits?

The leave is immediately available to all employees (no accrual requirement and no amount of time worked requirement).

The employer may not require the employee to exhaust other paid leave benefits before the use of emergency paid sick leave.

The leave is in addition to any other leave the employee may be entitled to under an employer's policy, under state or local paid sick leave laws, or under any collective bargaining agreement. Unlike other state and local paid sick and safe leave acts that provide that an employer does not have to provide the leave if its existing leave policies are equal to or greater than what is required, the Act does not include this language.

A provision in the original bill that would have prohibited employers from changing their current leave policies and health benefits in response to the Act was removed. So, while the employer may not require an employee to use other paid leave before using the paid leave under the Act, nothing in the Act seemingly prohibits an employer from making changes to its existing leave policies.

What notice and documentation requirements can an employer impose upon an employee seeking emergency paid sick leave?

After the first day of leave, the employer can require that the employee follow "reasonable" notice procedures in order to continue receiving the paid sick time. An employee, who is taking leave because of having been advised by a health care provider to self-quarantine due to concerns related to COVID-19, can be asked to provide a doctor's note.

Does the leave carry over to the next year if it has not been used? What if an employee never requests emergency paid sick leave, does it have to be paid out upon termination of employment or upon expiration of the Act?

The leave does not carry-over from one year to the next.

There is no right to be paid out upon termination of employment for sick leave not utilized under the Act.

The right to sick leave under (1) and (6) above expires upon the employee's next scheduled work shift immediately following the termination of *the need* for paid sick time.

Can an employer condition the taking of the leave on finding a replacement to take employee's shift or hours?

No, an employer cannot require the employee to find a replacement before taking time off.

What notice requirements does the employer have?

Employers must post a notice of the rights under this section of the Act where other notices to employees are customarily posted. The Act requires the Department of Labor to issue a model notice within 7 days of March 18, 2020 (March 25, 2020).

Are there anti-retaliation, penalties and enforcement mechanisms?

Yes, employers may not discharge, discipline, or retaliate against any employee who takes leave under the Act or who has filed a complaint related to enforcement of the Act. A violation of the Act is enforced as a violation of failure to pay minimum wages under the Fair Labor Standards Act. An employer can be subject to payment of unpaid wages, liquidated damages, attorney's fees and costs.

Is there a tax credit?

Yes. Employers will receive a tax credit to offset costs of providing emergency paid sick time.

See below for an explanation of the tax credits for Expanded FMLA and Emergency Paid Sick Leave Act.

Tax Credits for Paid Sick and Paid Family and Medical Leave

The Act provides for tax credits for employers who are required to offer paid sick leave under the provisions described above. This is a refundable payroll tax credit for qualified paid sick leave and paid family medical leave wages paid, which is permitted or allowed against the employer's portion of Social Security taxes. The credit is also available for self-employed workers. The credits are limited to the capped and aggregated amounts (as outlined above). In other words, if the employer provides more generous leave or the employee uses other paid leave benefits the employer provides, the amount of the tax credit is limited to the amounts that are required to be paid under the Families First Coronavirus Response Act. This payroll tax credit is available as of March 20, 2020, if Employer pays sick leave or FMLA leave prior to the effective date.