

The Families First Coronavirus Response Act Becomes Law: Implications for Employers



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03/19/2020

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “Act”). The Act contains several important provisions that require employers to offer paid leave for employees unable to work due to issues related to coronavirus (or COVID-19), whether through illness, quarantine, illness of a family member, or school closures. While the Act is certain to be costly for many employers, some costs are recoverable through tax credits against the Social Security payroll tax imposed on employers.

Emergency Family and Medical Leave Expansion Act

The Act creates the Emergency Family and Medical Leave Expansion Act, which amends the Family and Medical Leave Act (FMLA) to require employers to provide up to twelve weeks of leave, some of which must be paid, due to a qualifying need related to COVID-19. This amendment applies to all employers with fewer than 500 employees and to all employees who have been employed for at least thirty days, a departure from the FMLA’s normal requirements. While this expansion of the FMLA is narrow, the FMLA’s existing provisions will apply to employees otherwise impacted by COVID-19 to the extent they are requesting leave due to their own serious health condition or to care for a family member with a serious health condition.

In order to be eligible for leave under the Act, the employee must have a “qualifying need,” which means that the employee is unable to work (or telework) due to a need to care for an underage son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19.

The Act provides that the first ten days of leave are unpaid, though an employee may elect to substitute any accrued vacation leave, personal leave, or sick leave. If leave exceeds ten days, it must be paid at two-thirds of employee’s regular rate of pay as determined under the Fair Labor Standards Act (FLSA) for the number of hours the employee normally would have been scheduled to work. For employees with varying work hours, employers must use the average number of hours the employee worked over the previous six-month period. In all cases, an employer is not required to pay an employee more than \$200 per day and \$10,000 in the aggregate.

The Act creates job restoration requirements similar to those under the FMLA, meaning that employees who take leave to care for a child as described above must be restored to the same or a similar position. However, for employers with fewer than twenty-five employees, that may not be the case. The Act states that for those smaller employers, an employee’s job may not be restored if the position no longer exists due to economic conditions caused by COVID-19 and certain other conditions are met.

Importantly, employers of health care providers or emergency responders may lawfully exclude those employees from taking leave under this provision.

The Emergency Family and Medical Leave Expansion Act becomes effective on April 2, 2020, fifteen days after becoming law, and expires on December 31, 2020.

Emergency Paid Sick Leave Act

The Act also creates the Emergency Paid Sick Leave Act, which requires employers to provide paid sick leave to employees unable to work (or telework) for reasons related to COVID-19. This provision applies only to employers with fewer than 500 employees. Paid sick leave must be made available for immediate use to all employees, regardless of how long they have been employed.

The Act enumerates six instances where paid sick leave is required for employees unable to work (or telework):

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 healthcare provider to self-quarantine because of concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2);
5. The employee is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, because of COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employees qualifying for paid sick leave for one of these reasons are entitled to up to eighty (80) hours of paid sick leave. Part-time employees are entitled to paid sick leave for the number of hours worked, on average, over a two-week period. Paid sick leave granted under this Act does not carry over from year to year.

For employers with existing paid sick leave policies, the paid sick leave outlined in the Act must be made available to employees in addition to what the employer already offers. Employers are not permitted to change their existing policies to avoid this requirement. Importantly, employers may not require employees to use other paid time off before using paid sick time granted under the Act.

Employers must pay employees taking paid sick leave at their regular rate of pay except if they are caring for a family member, in which case they are entitled to two-thirds of their regular rate of pay, or minimum wage, whichever is greater. Employers may cap paid sick leave at \$511 per day per employee, or \$5,110 total, for leave taken for the reasons set forth in items (1) through (3), above, and may be capped at \$200 per day per employee, or \$2,000 total, for leave taken for the reasons set forth in items (4) through (6), above.

Employers may not take any adverse action against employees who have taken paid sick leave. Employers who do not follow this law and force otherwise qualified employees to take unpaid sick leave will be subject to fines and penalties similar to those under the FLSA, such as back pay, liquidated (double) damages, and attorney fees. For employers with twenty-five to fifty employees, the Secretary of Labor has authority to grant exceptions to the paid sick leave requirement if complying with the requirement would “jeopardize the viability of the business.”

Employers subject to this provision are required to post notice of the paid sick leave requirements in a conspicuous place. The Act states that the Secretary of Labor must make publicly available a model notice not later than seven days after the Act's enactment, or by March 25, 2020.

Employers of health care providers or emergency responders may lawfully exclude those employees from taking paid sick leave under this provision.

Like the Emergency Family and Medical Leave Act expansion, this provision becomes effective on April 2, 2020, fifteen days after becoming law, and expires on December 31, 2020.

Tax Credits for Employers Subject to the Act

While employers must front the cost of providing paid leave in accordance with the Act, the Act provides for a refundable tax credit equal to 100% of qualified paid leave wages against the Social Security payroll taxes employers are required to pay.

For employees who took leave under the Emergency Family and Medical Leave Expansion Act, the credit is limited to \$200 per day, per employee and cannot exceed \$10,000 total for any one employee.

For employees who took leave under the Emergency Paid Sick Leave Act, the credit is limited to \$511 per day for employees who are personally sick with COVID-19. The limit is \$200 per day for employees taking leave to care for children or other family members.