

EMERGENCY FMLA LEAVE AND PAID SICK LEAVE LAW TO ADDRESS CORONAVIRUS - COVID-19 PANDEMIC

On March 18, 2020, President Trump signed into law the “Families First Coronavirus Response Act,” which was passed by Congress in response to the coronavirus or COVID-19 pandemic. The new law seeks to provide additional protected and paid leave for workers affected by the pandemic.

For employers with fewer than 500 employees, the law creates two types of paid leave related to the coronavirus pandemic: (1) up to 12 weeks of protected FMLA leave if the employee is unable to work (or telework) to care for a child whose school or day care is closed due to the coronavirus pandemic; and (2) up to 2 weeks of paid sick leave for an employee who is under quarantine, has symptoms of the virus or needs to care for an individual who is under quarantine or has symptoms of the virus or who is caring for a son or daughter whose school or daycare is closed due to the coronavirus pandemic.

Posting requirement: Employers must post a notice, in a form approved by the Secretary of Labor, describing the emergency paid sick leave requirements. The Secretary will make a model notice available no later than March 25.

The key paid FMLA and paid sick leave provisions are summarized below:

EMERGENCY FAMILY AND MEDICAL LEAVE ACT RELATED TO CHILD CARE

Effective date: Effective April 2, 2020; the law expires on December 31, 2020

Covered Employer: An employer with *fewer* than 500 employees.

The law is silent on how the 500 employee threshold is calculated. However, it is reasonable to believe that the test for calculating the number of employees under current FMLA regulations will apply. That is, under 29 CFR 825.104, separate entities will be deemed to be part of a single employer for purposes of FMLA if they meet the integrated employer test.

Eligible Employee: Any full-time or part-time employee that has been on the employer’s payroll for 30 calendar days.

However, the law allows employers to *exclude* employees who are health care providers or emergency responders from this emergency FMLA entitlement.

Reasons for FMLA Leave: Eligible employees are entitled to take *up to 12 weeks* of FMLA leave for “a qualifying need related to a public health emergency.” This “qualifying need” is limited to circumstances where an employee is unable to work (or telework) to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency.

How Much Pay is Required during FMLA Leave?

- The first **10 days** (two weeks) are unpaid, but an employee can substitute accrued paid leave, *including emergency paid sick leave* (see below). It is unclear whether an employer can *require* the employee to use accrued paid leave during the 10-day period. The law is silent on this issue, though it cites back to a provision of the FMLA that allows the employer to require the use of accrued paid leave.

- The remaining 10 weeks are paid at 2/3 of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work (with a maximum payment of \$200 per day and \$10,000 total)

Restoration to Position after Leave Ends: Emergency FMLA leave is job-protected, meaning the employer must restore an employee to the same or equivalent position upon their return to work from qualifying leave. However, the new law includes an exception to this requirement for employers with fewer than 25 employees, if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency, subject to certain conditions.

Notably, if the small employer does not return the employee because of operational changes, the employer must make reasonable efforts to contact a displaced employee for up to one year after they are displaced if an equivalent position becomes available.

Tax credits: The new law provides for a series of refundable tax credits for employers providing paid FMLA, including tax relief for self-employed individuals. Specifically, the law provides for:

- A refundable tax credit for employers equal to 100 percent of qualified family leave wages required to be paid by the Emergency Family and Medical Leave Expansion Act that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) (the employer portion of Social Security taxes). The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. If the credit exceeds the employer's total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.
- A refundable tax credit equal to 100 percent of a qualified family leave equivalent amount for eligible self-employed individuals. The credit is allowed against income taxes and is refundable. Eligible self-employed individuals are individuals who would be entitled to receive paid leave pursuant to the Emergency Family and Medical Leave Expansion Act if the individual was the employee of an employer (*i.e.*, not self-employed). The qualified family leave equivalent amount is capped at the lesser \$200 per day or the average daily self-employment income for the taxable year per day.

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EMERGENCY PAID SICK LEAVE ACT

Effective date: Effective April 2, 2020; the law expires on December 31, 2020

Covered Employer is any of the following:

1. A private employer with *fewer* than 500 employees
2. A public agency (federal/state governments, political subdivisions, schools)
3. Any other entity that is not a private entity (The law does not specify and the current FMLA does not define this term, but perhaps refers to quasi-public or quasi-governmental employers.)
4. Anyone acting directly or indirectly in the interests of the employer. It is unclear what this means and it is not defined in the law.

Eligible Employee: Unlike the emergency FMLA requirements, an employee is immediately eligible for paid sick leave (there is no 30 calendar day requirement)

Reasons for Sick Leave: Employers are required to provide paid sick leave to an employee who is unable to work or telework 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 because of COVID-19;

3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual subject or advised to quarantine or isolation;
5. the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

How Much Paid Leave is Required? Employees are entitled to the following:

- **Full-time employees:** 80 hours at their regular rate of pay. However, when caring for a family member (for reasons 4, 5, and 6 above), sick leave is paid at two-thirds the employee's regular rate.
- **Part-time employees:** the number of hours that the employee works, on average, over a 2-week period

The law limits paid leave to \$511 per day (\$5,110 in total) where leave is taken for reasons (1), (2), and (3) noted above (generally, an employee's own illness or quarantine); and \$200 per day (\$2,000 in total) where leave is taken for reasons (4), (5), or (6) (care for others or school closures).

Sequence of and Rules for Leave: The new law requires that the employer allow the employee to first use sick leave provided for under this sick leave law, then decide to use any remaining accrued paid leave under an employer's policy. The employer *cannot* require the employee to use accrued leave under an employer policy first.

Paid Leave Before Effective Date: Any paid leave generously provided by an employer before the law is effective cannot be credited against the employee's paid leave entitlement. However, hours cannot be carried over after December 31, 2020 (when the legislation sunsets), and based on the language of the law, an employee's right to take paid sick leave ends after they return from their leave.

The law also ensures that employees who work under a multiemployer collective agreement and whose employers pay into a multiemployer plan are provided with leave.

Retaliation

As with other similar laws, the new act includes anti-retaliation protections.

Tax Credits: As above with the emergency FMLA, the new paid sick leave law offers employers to be reimbursed for sick leave:

- A refundable tax credit for employers equal to 100 percent of qualified paid sick leave wages required to be paid by the Emergency Paid Sick Leave Act that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) of the Internal Revenue Code (the employer portion of Social Security taxes).
- A refundable tax credit for self-employed individuals equal to 100 percent of a qualified sick leave equivalent amount for eligible self-employed individuals who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to coronavirus. For eligible self-employed individuals caring for a family member or for a child whose school or place of care has been closed due to coronavirus, the section provides a refundable tax credit equal to 67 percent of a qualified sick leave equivalent amount.

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For More Information

If you have questions or want more information regarding the Families First Coronavirus Response Act, contact your legal counsel. If you do not have regular counsel for such matters, Berkowitz Oliver would welcome the opportunity to work with you to meet your specific business needs. Berkowitz Oliver's employment group regularly counsels employers about their obligations under federal and state laws. For more information, contact Kathleen Nemechek, Tim Millman, Jocelyn Villanueva, Sharon Stallbaumer or Megan Costello (contact information at <http://www.berkowitzoliver.com/our-people/>). Also, please visit our website at www.berkowitzoliver.com

This information is provided as of March 20, 2020. Of course, this is a rapidly evolving situation and new or revised legislation is likely. Please make sure to monitor continuing developments.

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