



March 19, 2020

Client Alert – Employment Law
The Families First Coronavirus Response Act
COVID-19 (Coronavirus)

As reported in the media, the Families First Coronavirus Response Act provides for paid sick leave and expands the FMLA to include a public health emergency. This Client Alert discusses those portions of the Act that significantly impact employers.

As a point of clarification, the Families First Coronavirus Response Act is a comprehensive law that actually includes two different Acts specific to employers: the *Emergency Family And Medical Leave Expansion Act* and the *Emergency Paid Sick Leave Act*. This Client Alert discusses both.¹

Emergency Family And Medical Leave Expansion Act

Term

Begins on the date the Emergency Family and Medical Leave Expansion Act takes effect (the Act is effective no later than 15 days after its enactment).

Ends on December 31, 2020.

Covered Employee

The Act applies to an employee employed for at least 30 calendar days by the employer.
Under the existing FMLA an employee must be employed for 12 months.

Covered Employer

The Act applies to an employer with fewer than 500 employees.
The existing FMLA applies to employers with 50 or more employees.

Covered Event

The Act adds the need to take leave related to a public health emergency as a new qualifying event. To trigger that event the employee must:

1. Be unable to work (or telework) due to a need:
 - a. To care for the son or daughter:
 - i. Of employee, and
 - ii. Under 18 years of age:
 1. If the school or place of care has been closed, or
 2. The child-care provider of such son or daughter is unavailable
 - iii. Due to a public health emergency.

¹ Note that the DOL will be issuing additional specifics and this Client Alert is an abbreviated summary.

2. The DOL has the authority to exempt health care workers, emergency responders, and small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern.

Paid Leave Provision

1. Under the FMLA an employee may take up to 12 weeks of leave. The first 10 days may be unpaid.
2. An employee may elect to substitute any paid leave that they have accrued for this unpaid leave.
3. The remaining 10 weeks must be paid leave. The rate of pay is:
 - a. Two-thirds of an employee's regular rate of pay (for the employee's normally schedule).
 - b. In no event shall such paid leave exceed:
 - i. \$200 per day; and
 - ii. \$10,000 in the aggregate.
4. If an employee's schedule varies from week to week and the employer can't determine the number of hours an employee would have worked then use:
 - a. The average number of hours scheduled per day over the 6-month period prior to leave; or
 - b. If the employee did not work for the six months prior, then the employee's reasonable expectation as to the average number of hours when hired.
5. If the leave is foreseeable, the employee shall provide the employer with such notice of leave as is practicable.

Restoration

Employees out on FMLA must be restored to their job when they return. Because this Act changes so many parts of the FMLA, there is a new provision that the restoration rule does not apply to an employer with fewer than 25 employees if:

1. The employee's position does not exist due to economic conditions or other changes in operating conditions of the employer caused by the public health emergency; and
2. The employer makes reasonable efforts to restore the employee to a position equivalent to the position held within a year.

Emergency Paid Sick Leave Act

1. An employer shall provide paid sick time to employees unable to work (or telework) because:
 - a. The employee is subject to an isolation order related to COVID-19.
 - b. The employee is advised to self-quarantine by a health care provider due COVID-19.
 - c. The employee experiences COVID-19 symptoms and seeks medical diagnosis/treatment.
 - d. The employee is caring for an individual subject to, or advised to, quarantine.
 - e. The employee is caring for employee's child because school (or place of care) is closed or unavailable due to COVID-19.
 - f. The employee is experiencing any other substantially similar condition.
2. Paid Sick Leave calculation
 - a. Sick leave taken because:
 - i. The employee is subject to an isolation order related to COVID-19.
 - ii. The employee is advised to self-quarantine by a health care provider due COVID-19.

- iii. The employee experiences COVID-19 symptoms and seeks a medical diagnosis.
 - iv. Is paid at the greater of:
 1. The employee's regular rate of pay
 2. The FLSA minimum wage
 3. The local minimum wage
 - b. Sick leave taken because:
 - i. The employee is caring for an individual subject to, or advised to, quarantine.
 - ii. The employee is caring for employee's child because school (or place of care) is closed or unavailable due to COVID-19.
 - iii. The employee is experiencing any other substantially similar condition.
 - iv. Is paid at two-thirds of the amount described.
3. Maximum sick pay depends on reason taken.
 - a. Maximum paid sick leave is:
 - i. \$511 per day and
 - ii. \$5,110 in the aggregate
 - iii. If sick leave is used because:
 1. The employee is subject to an isolation order related to COVID-19.
 2. The employee is advised to self-quarantine by a health care provider due COVID-19.
 3. The employee experiences COVID-19 symptoms and seeks a medical diagnosis.
 - b. Maximum paid sick leave is:
 - i. \$200 per day and
 - ii. \$2,000 in the aggregate
 - iii. If sick leave is used because:
 1. The employee is caring for an individual subject to, or advised to, quarantine.
 2. The employee is caring for employee's child because school (or place of care) is closed or unavailable, due to COVID-19.
 3. The employee is experiencing any other substantially similar condition.
4. Duration of paid sick leave
 - a. Full-time employees = 80 hours.
 - b. Part-time employees = a average number of hours the employee works in 2-weeks.
 - c. Paid sick time does not carry over to the next year.
5. An employer cannot require the employee to find a replacement to cover the time off.
6. Paid sick is available for immediate use by the employee (they do not have to have been employed for 30 days etc.).
7. An employee may first use the paid sick time (before any employer-provided paid leave).
8. An employer cannot require an employee to use other paid leave before the paid sick time.
9. Each employer must post a notice of the requirements described in this Act.

10. It's unlawful for an employer to discharge, discipline, or in any other manner discriminate against any employee who takes leave under this Act or files any complaint related to this Act (or participates).
11. An employer who fails to comply shall be considered to have failed to pay minimum wages in violation of section 6 of the FLSA.
12. The Act is effective as of no later than 15 days after its enactment and expires on December 31, 2020.
13. An employer may require the employee to follow reasonable notice procedures in order to continue receiving paid sick time.
14. The DOL has authority to exempt small businesses with fewer than 50 employees from the requirement to provide sick leave for an employee who is caring for a son or daughter of such employee because the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions when the imposition of such requirements would jeopardize the viability of the business as a going concern

The Act also includes certain refundable tax credits for employers that are required to offer emergency FMLA or paid sick leave. However, the credits are generally only available to those employers required to offer these benefits under the Act and are not generally extended to employers not subject to the new mandates.

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