

The Details Employers Need to Know About the Families First Coronavirus Response Act

The newly enacted Families First Coronavirus Response Act fundamentally amends the Family and Medical Leave Act and also enacts the Emergency Paid Sick Leave Act. The basic result of these two new laws is to provide employees with paid leave for purposes related to the COVID-19 pandemic. These leave requirements will be in effect through December 31, 2020. Although we have summarized the primary portions of the legislation, here is a detailed provision-by-provision breakdown of each Act:

Emergency Family and Medical Leave Expansion Act

- **New category of FMLA leave:** The Act amends the FMLA and authorizes leave for a “qualifying need related to a public health emergency.” The term “public health emergency” is defined as an emergency with respect to COVID-19, the new coronavirus.
- **Employer threshold:** The Act applies to all private employers with fewer than 500 employees, and to all governmental employers regardless of the number of employees.
- **Eligible employee:** Any employee employed for 30 calendar days with the employer from which leave related to a public health emergency is requested, including both full- and part-time employees.
- **Permissible reason for leave:** To be eligible for “public health emergency leave,” an employee must be unable to work or telework due to the need to care for son or daughter under 18 years old if school or place of care is closed, or if child care provider unavailable, because of public health emergency.
- **Unpaid leave:** The first 10 days of leave may be unpaid, but the employee may elect to substitute accrued but unused paid leave.
- **Paid leave:** The remainder of any public health emergency leave (up to the FMLA maximum of 12 workweeks) must be paid at two-thirds of the employee’s regular rate of pay for normal work schedule.
 - For employees whose schedules vary from week to week, calculation is average hours scheduled to work over prior 6-month period.
- **Cap on paid leave:** The paid FMLA leave required under this Act is capped at \$200 per day, or \$10,000 aggregate.
- **Right to reinstatement:** Employees on this type of leave generally have the right to reinstatement upon returning to work.
 - But reinstatement is not required for employers with fewer than 25 employees if employee’s position no longer exists because of business/economic conditions related to the public health emergency AND employer makes reasonable efforts to restore employee to equivalent position.
- **Small employer lawsuit exclusion:** Employers with fewer than 50 employees are not subject to being sued by employees for failure to provide leave. But even these employers may be subject to suit by Secretary of Labor.
- **Exclusion of health care providers/emergency responders:** Employers may, but are not required to exclude health care providers and emergency responders from being able to take FMLA leave under the new Act.
- **Possible exemptions by DOL:** The Secretary of Labor is authorized to issue regulations, excluding certain health care providers and emergency responders, from the provisions of the Act, and may also exempt small businesses with fewer than 50 employees if leave “would jeopardize the viability of the business as a going concern.”

Emergency Paid Sick Leave Act

- **Employer threshold:** The Act applies to all private employers with fewer than 500 employees, and to all governmental employers regardless of the number of employees.

- **Eligible employee:** Every employee (both full- and part-time) employed by the employer is eligible for paid sick leave under the Act, regardless of the length of employment.
- **Reasons for leave:** Employee must be unable to work or telework and needs leave because:
 1. Federal, State, or local quarantine or isolation order.
 2. Advised by health care provider to self-isolate.
 3. Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
 4. Is caring for an individual subject to quarantine/isolation order or who has been advised by health care provider to self-isolate.
 5. Is caring for son or daughter whose school is closed or child care provider is unavailable.
 6. Is experiencing “any other substantially similar condition specified by the Secretary of Health and Human Services in conjunction with the Secretary of the Treasury and Secretary of Labor.”
 - BUT employers may exclude health care providers and emergency responders from leave under this subsection.
- **Exclusion of health care providers/emergency responders:** Employers may, but are not required to exclude health care providers and emergency responders from being able to take paid sick leave under the new Act.
- **Amount of leave:**
 - 80 hours for full-time employees.
 - For part-time employees, average number of hours employee works during 2-week period. This is determined based on number of hours employee was scheduled to work per day over the prior 6-month period.
- **Cap on amount of leave:**
 - Sick leave taken for the purposes listed in 1-3 above is capped at \$511 per day/\$5,110 aggregate.
 - Sick leave taken for the purposes listed in 4-6 above is capped at \$200 per day/\$2,000 aggregate.
- **Limitation on compensation:** For sick leave taken under 4-6 above, the required compensation is only 2/3 of employee’s regular rate.
- **No carryover of sick leave:** Sick leave does not carry over from one year to the next.
- **No search for replacement:** Employers cannot require an employee taking sick leave under the Act to search for, or find a replacement for time the employee will miss while on leave.
- **Use of paid sick time first:** Employees can use this paid sick time first, and the employer cannot require employees to exhaust other paid leave first.
- **No discrimination or retaliation:** The Paid Sick Leave Act includes anti-discrimination and anti-retaliation provisions applicable to all employers that are subject to the Act.
- **Penalties for violation:** If an employer fails to provide leave under the Act or terminates someone for taking leave under the Act, the employer will be subject to the same penalties as for violations of the Fair Labor Standards Act.
- **No pay out at end of employment:** The Act does not require employers to pay employees for unused sick time upon the end of their employment.
- **Guidelines:** The Secretary of Labor is required to issue guidelines within 15 days of enactment that “assist employers in calculating the amount of paid sick time” to be paid to employees.
- **Notice of sick leave:** Employers may require employees to adhere to “reasonable notice procedures” in order to receive paid sick time under the Act.
- **Potential DOL exemptions:** The Secretary of Labor is authorized to issue regulations exempting health care providers and emergency responders by allowing their employers to “opt out” of the Act. The Secretary of Labor may also exempt small businesses that employ fewer than 50 employees, when the imposition of the sick leave requirements would jeopardize the business as a going concern.

Tax Credit

- **Dollar-for-dollar credit:** Employers are provided a “dollar-for-dollar” tax credit for wages paid as either paid sick leave or paid FMLA leave, up to the maximum caps for each type of leave.
- **FICA Payroll Tax:** The amounts are credited against the employer’s FICA payroll tax payments on wages due to all employees (even those who did not take either type of leave).
- **Refunds to employer:** If the credits exceed the amount due, the excess is refunded to the employer and must be included in the employer’s gross income.

We understand COVID-19 is spawning a wide variety of legal questions, most notably in the areas of supply chain management, risk management, and employment. The amendments passed today are an example of what we will likely continue to see in the days and months ahead. We will continue working closely with our clients daily to adjust and anticipate specific situations unique to your businesses.

Please contact [Justin Furrow](#), [Jim Catanzaro](#), or your relationship attorney if you have questions or need additional information.

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