

Families First Coronavirus Response Act

AN FAQ FOR EMPLOYERS

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“Act”). The Act contains several new legal obligations that employers need to be aware of, including expansion of family and medical leave, the creation of paid sick leave, and employer tax credits. Notably, the Secretary of Labor has not yet published regulations addressing these changes and it will likely be sometime in April before those are published although the Department of Labor has provided some interim interpretative guidance. We anticipate that these regulations will provide some additional guidance related to the Act and encourage employers to stay updated on any changes.

I. Emergency Family and Medical Leave Expansion Act

The Act expands the current Family and Medical Leave Act (“FMLA”) to provide partially paid leave to employees related to a COVID-19 related closure of a school or child-care facility. This provision departs from the existing FMLA in several distinct ways. The effective date of this provision is April 1, 2020 and it will expire on December 31, 2020. Leave may not be carried over.

Which employers are subject to this provision? Private employers with fewer than 500 employees and certain public employers. Employers of health care providers and emergency responders may exclude such workers from this leave. We expect that the Secretary of Labor will issue additional guidance and regulations that exclude certain health care providers and emergency responders from the definition of eligible employee and caution employers of these providers to consult legal counsel prior to making leave eligibility determinations.

Are there exceptions for small employers? Yes. The Act grants the Secretary of Labor the authority to exempt small businesses with fewer than 50 employees from this paid leave requirement if compliance with such requirement would jeopardize the viability of the business. The most recent guidance from the Department of Labor permits a small business to claim this exemption if an authorized officer of the business has determined that:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

At this point, small businesses do not need to send any material to the Department seeking any exemption.

What leave is provided? The Act provides paid leave for employees who are unable to work or telework and need leave to care for a minor (under 18) son or daughter because the child's school or place of care has been closed or the child care provider of such child is unavailable due to a public health emergency. This leave covers employees whose employers have work for them, yet they are unable to perform that work, either under normal circumstances at their normal place of work, or via telework because of COVID19 related need to care for their child(ren). Employers and employees may mutually agree to adjust the schedule of an employee so that leave is not necessary.

How much leave is available and how much are employees paid? Up to 12 weeks of paid leave is available for those employees who have been employed by the company for at least 30 days. The first 10 days of emergency FMLA are taken unpaid. An employee may elect to take any available paid leave during this 10-day period; however, an employer may not require them to do so. The remaining time, up to 12 weeks, shall be paid at a rate of at least of the employee's regular rate of pay. The maximum pay is \$200/day and \$10,000 in the aggregate for the number of hours than the employee would otherwise be normally scheduled to work.

May leave be taken intermittently? Yes, employees who are entitled to take expanded family leave are eligible to do so intermittently in increments agreeable to the employer whether they are on-site or teleworking. The Department of Labor encourages employers and employees to work together voluntarily to achieve flexibility and meet mutual needs.

Can an employee use other paid leave to supplement the amount paid under expanded FMLA? Yes, with the permission of the employer the employee may choose to use existing paid vacation, personal, medical, or sick leave from your paid leave policy to supplement the amount your employee receives from paid sick leave or expanded family and medical leave, up to the employee's normal earnings. This is subject to the consent of the employer.

What notice is required from an employee? If the need for leave is foreseeable, an employee shall provide as much notices as is practical. Employers may require employees to provide documentation in support of such leave, such as a notice of school closure.

Are there job reinstatement requirements under this expanded leave? Employers with fewer than 25 employees are not required to reinstate employees provided that

- The position has been eliminated due to the pandemic;

- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent pay, benefits, etc.; and
- If no such position is then available, but becomes available within a year, then the employer shall make reasonable efforts to contact the employee.

How does the Act apply to existing FMLA laws? The above provisions only apply if the employee takes leave for child-care reasons related to the pandemic. Leave may still be available under other FMLA provisions such as the employee taking leave for illness or to care for a sick family member. No paid leave is required under those regular FMLA provisions, other than whatever paid leave the employee is entitled to from their employer.

How do business closures affect an employer's leave obligations for expanded FMLA? If, prior to the Act's effective date, the employer sent employees home and stopped paying them because it did not have work for them to do, the employees will not get paid sick leave or expanded family and medical leave but may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. If the employer closes the worksite after April 1, it only has to fulfill the leave obligations under the Act for that leave actually taken by employees (not merely requested) between April 1 and the date of closure. Again, employees may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

How do employee furloughs affect an employer's obligations if the employer otherwise remains open or operational? Furloughed employees are not eligible for expanded FMLA. They may be eligible for unemployment benefits.

II. Paid Sick Leave

This provision requires certain employers provide their employees with paid sick leave (PSL) to use for themselves and care for their family members during this COVID-19 emergency. The effective date of this provision is April 1, 2020 and it expires on December 31, 2020. Leave may not be carried over and need not be paid out upon termination.

Which employers are subject to this provision? Private sector employers with fewer than 500 employees, government employers, and all other non-private entity employers with more than one employee are required to provide their employees with paid sick leave. The Act entitles employees of covered employers to paid sick leave, regardless of how long the employee has worked for the employer. Employers of health care providers and emergency responders may exclude such workers from this leave. We expect that the Secretary of Labor will issue additional regulations that exclude certain health care providers and emergency responders from the definition of eligible employee and caution employers of these providers to consult legal counsel prior to making leave eligibility determinations.

Are there exceptions for small employers? Yes. The Act grants the Secretary of Labor the authority to exempt small businesses with fewer than 50 employees from this paid leave requirement if compliance with such requirement would jeopardize the viability of the business. The most recent guidance from the Department of Labor permits a small business to claim this exemption if an authorized officer of the business has determined that:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

At this point, small businesses do not need to send any material to the Department seeking any exemption.

What leave is provided? Under the Act, an employee qualifies for PSL if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or the child-care provider is unavailable) for reasons related to COVID-19; or

6. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. How much leave is available and how much are employees paid? Under the Act, full-time employees are eligible for 80 hours of PSL and a part-time employee is eligible for leave equal to the average amount that an employee works over a two-week period.

- For employees taking leave for reasons 1-3 above, the leave shall be at either their regular rate, or the applicable minimum wage, whichever is higher, up to \$511/day and \$5,110 in the aggregate over the 2-week period.

- For employees taking leave for reasons 4-6, employees shall be paid at of their regular rate or of the applicable minimum wage, whichever is higher, up to \$200/day and \$2,000 in the aggregate over the 2-week period.

Can PSL be taken intermittently? This depends on the reason for the leave and whether the employee is teleworking. Sick leave must be taken in full day increments and non-intermittently if the employee is taking such leave for reasons 1-4 and 6 above. Unless an employee is teleworking, once they begin taking PSL for one of those reasons, the leave continues each day until they use the full amount of PSL, or they no longer have a reason to take PSL. The purpose of PSL is to prevent spreading the virus to others, hence the restrictions. For those workers taking PSL to care for a child whose school is closed, they may do so intermittently in increments agreeable to the employer whether they are on-site or teleworking. The Department of Labor encourages employers and employees to work together voluntarily to achieve flexibility and meet mutual needs.

How does PSL affect an employer's existing leave policies? PSL is in addition to any sick leave available under an employer's existing policies. PSL leave is available for immediate use and the employer cannot require the employee to use other paid leave before PSL. Nor can the employer require the employee to look for or find a replacement worker prior to taking leave. Under the Act, the employee may choose to use existing paid vacation, personal, medical, or sick leave from your paid leave policy to supplement the amount they receive from PSL, up to the employee's normal earnings. This is subject to the consent of the employer.

Can an employee elect extended FMLA and PSL concurrently? Yes, an employee may choose to use the paid sick leave benefit to cover the 10-day gap in pay under the extended FMLA being taken for child-care. An employer cannot prohibit them from doing this.

How do business closures affect an employer's leave obligations for PSL? If, prior to the Act's effective date, the employer sent employees home and stopped paying them because it did not have work for them to do, the employees will not get paid sick leave or expanded family and medical leave but may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. If the employer closes the worksite after April 1, it only has to fulfill the leave obligations under the Act for that leave actually taken by employees (not merely requested) between April 1 and the date of closure. Again, employees may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

How do employee furloughs affect an employer's obligations if the employer otherwise remains open or operational? Furloughed employees are not eligible for PSL. They may be eligible for unemployment benefits.

III. Employer Tax Credit

The Act provides for a payroll tax credit paid for emergency FMLA. The amount of the credit is equal to 100 percent of the "qualified family leave wages" that the employer is required to pay for the applicable quarter. The dollar-for-dollar credit results in \$200 per employee for any day (or portion thereof) for which the employer pays the employee qualified family leave wages, up to a maximum aggregate amount for all calendar quarters of \$10,000 per employee. The credit is taken on the employer's quarterly Social Security tax remittance and is refundable where the credit exceeds employment taxes owed.

Also, the Act provides that employers will receive a payroll tax credit for qualified sick leave wages. For PSL taken for reasons 1-3 as discussed in Section II, the amount of qualified sick leave wages eligible for the tax credit is capped at \$511 per employee per day up to \$5,110 (10 days) in the aggregate. For PSL taken for reasons 4-6 as discussed in Section II the amount of qualified sick leave wages eligible for the tax credit is capped at \$200 per employee per day, up to \$2,000 (10 days) in the aggregate. The credit is taken on the employer's quarterly Social Security tax remittance and is refundable where the credit exceeds employment taxes owed.

Employers should work with their accountants and/or tax counsel to ensure that they are properly applying the credit.