

FAMILIES FIRST COVID-19 RESPONSE ACT: WHAT EMPLOYERS NEED TO KNOW

Presented by:

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FAMILIES FIRST CORONAVIRUS RESPONSE ACT OVERVIEW

- **Passed House on 3/14/2020; House changes made late 3/16/2020 for “technical corrections.”**
- **Senate passed 3/18/2020; President Trump signed 3/18/2020.**
- **Leave Provisions Go Into Effect 15 Days After Enactment (DOL Says April 1)**
- **Paid and Unpaid Leave for Coronavirus-Related Reasons**
 - Emergency Paid Sick Leave
 - Emergency Family and Medical Leave Act (Expands FMLA)
- **Emergency Unemployment Insurance Stabilization And Access Act of 2020**
 - Unemployment Insurance Funding
- **Reimbursement to Employers as Tax Credits**

EMERGENCY PAID SICK LEAVE

EMERGENCY PAID SICK LEAVE

- **Employers with 1-499 employees**
 - How do you count employees? When are separate entities combined?
 - DOL “Q&A” (3/24) indicates look to FLSA “joint employer” standard
- **Any employee who works for employer is eligible**
 - No minimum days/hours of employment
- **If the EMPLOYEE is sick, employee is entitled to:**
 - Full-time Employees – 80 hours of paid sick leave
 - Part-time Employees – Paid based on the average number of hours the employee worked for the six months prior to taking this paid sick leave.
 - Or, if employed for less than 6 months, the average number of hours per week the employee would normally be scheduled
 - **DOL has not yet provided a definition of “full time” or “part time”**

EMERGENCY PAID SICK LEAVE Qualifying Reasons

Paid sick time required if EE is unable to work (or telework) due to a need for leave because:

- (1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19 [**Note: According to recent DOL Guidance, “shelter in place” orders should not qualify**].
- (2) The employee has been advised by a health care provider to self-quarantine due to 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 or self-quarantine as described above.
- (5) The employee is caring for a son or daughter if school or child care is closed/unavailable.
- (6) The employee is experiencing “any other substantially similar condition” specified by HHS (catch all).

EMERGENCY PAID SICK LEAVE

- **At employee's regular rate for qualifying reasons (1), (2) or (3)**
 - Compensated at HIGHER of their regular rate, federal minimum wage or local minimum wage
- **At 2/3 the employee's regular rate for qualifying reasons (4), (5) or (6)**
- **Capped at the following levels:**
 - \$511 per day and \$5,110 in the aggregate per person for qualifying reasons (1), (2) and (3).
 - \$200 per day and \$2,000 in the aggregate per person for qualifying reasons (4), (5) and (6).

Calculating Regular Rate

1. What is my regular rate of pay for purposes of the FFCRA?

For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your [regular rate](#) over a period of up to six months prior to the date on which you take leave. [\[2\]](#) If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.

If you are paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

EMERGENCY PAID SICK LEAVE CONT.

- **Exemption**
 - An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this section.
- **Secretary of Labor has the authority for good cause to issue regulations:**
 - To exclude certain health care providers and emergency responders from the definition of “eligible employee”
 - **Very recent DOL Guidance indicates that small businesses with fewer than 50 employees may exempt themselves but must document why the paid leave would jeopardize the viability of the business as a going concern. Further guidance from DOL will be coming on this issue.**

EMERGENCY PAID SICK LEAVE CONT.

Additional General Rules

- Sick leave does not carry over
- Employee may first use this paid sick time under this law before other paid leave
- Employer may not require employee to use other paid leave provided by the employer before using this paid sick leave
- Employer can choose to allow employee to supplement sick leave with employer-provided PTO or sick pay, but not required
- According to recent DOL guidance, an employer is not required to pay sick leave if it closes the business *even if* the employee has already requested leave.
- Similarly, if employee is already out on paid sick leave when employer closes the business, no additional payments required following the date of closure.

EMERGENCY PAID SICK LEAVE Notice Requirements

- **Employers:** Employers must post a notice regarding the requirements of the law.
 - The Secretary of Labor is required to make a model notice publicly available no later than 7 days after enactment of the new law.
- Employer can request proof to substantiate employee's need for leave
- *Law goes into effect "no later than" 15 days after enactment of the Act.*
 - **DOL says April 1, 2020**
- *Temporary (sunsets 12/31/2020).*

EMERGENCY PAID SICK LEAVE Tax Credits

- Employers subject to the requirements are entitled to a refundable tax credit equal to the amount of the qualified paid sick leave requirements paid by the employer per quarter.
- The tax credits for qualified paid sick leave wages are capped at
 - \$511 per day per person for qualifying reasons (1), (2) and (3).
 - \$200 per day per person for qualifying reasons (4), (5) and (6).
- The tax credits are applied against employer Social Security taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.

EMERGENCY PAID SICK LEAVE Tax Credits

- IRS has said they will be issuing guidance to address the “cash flow” challenge created by this tax credit.
- Guidance will allow employers to retain an amount of payroll taxes equal to the amount of paid leave that they paid, rather than deposit them with the IRS...in anticipation of the tax credit.
- Example:
 - “If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.”

EMERGENCY FAMILY AND MEDICAL LEAVE

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

- **Employers with 1-499 employees**
 - How do you count employees? When are separate entities combined?
 - DOL “Q&A” (3/24) indicates look to FMLA “integrated employer” or “joint employer” tests.
- **Significantly expands FMLA on a temporary basis (through 2020).**
- **Any employee who worked for employer for 30 days prior to leave and has a qualifying reason is eligible (no requirement of 12 months/1250 hours)**
- **Provides up to 12 weeks of job-protected leave (paid after the first 10 days)**

EMERGENCY FAMILY AND MEDICAL LEAVE ACT Qualifying Reasons

12 weeks of job protected leave when:

- “The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”
- Likely FMLA definition of “son or daughter” will apply.

“Public Health Emergency”

- An emergency with respect to COVID-19 declared by a Federal, State or local authority

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

How Does it Work

- **First 10 days of EFMLA may be unpaid**
 - An employee may elect to substitute accrued PTO, vacation, or sick leave to cover any portion of first 10 days
 - Employer cannot require an employee to substitute such leave
- **After the first 10 days:**
 - Compensated at 2/3 of the regular rate
 - Part-time employees/irregular schedule entitled to be paid based on average number of hours employee worked in prior 6 months, or if employed less than 6 months, average number of hours employee would normally be scheduled to work
 - **Pay capped at \$200 per day and \$10,000 in aggregate per employee**

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Job Restoration/Reinstatement

- If 25 or more employees, traditional restoration obligation
- If **fewer than 25 employees**, the traditional job reinstatement provisions of the FMLA do not apply **IF** the following conditions are met (note this **does not excuse** provision of E-FMLA):
 - The employee takes E-FMLA
 - The position the employee held when the leave started does not exist due to economic conditions or other changes in operating conditions of the employer (i) that affect employment; and (ii) are caused by a public health emergency during the period of leave
 - The employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent pay, benefits, and other terms
 - If reasonable efforts to restore to an equivalent position fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the 1 year period beginning on the earlier of (A) the date on which the qualifying need related to a public health emergency concludes; or (B) the date that is 12 weeks after the date on which the employee's leave for E-FMLA commences.

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Interplay with Other Paid Leave

- Full-time employees may take their 80 hours of Emergency Paid Sick Leave (if applicable) for first 10 days of EFMLA leave (which would otherwise be unpaid).
 - DOL “Q&A” (3/24) indicates leaves run concurrently like this when used for same purpose (school/child care closures)
- Employees may also elect to use other accrued paid leave (e.g. vacation and PTO) during the first 10 days
- Unclear if eligibility for EFMLA and FMLA (for other non-COVID-19 related reasons) is 12 weeks total. Statutory construction supports an argument this does not increase the overall 12 weeks FMLA requirement.
- This may be something the DOL clarifies.

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Notice Requirements

- **Employers:** No new specific notice requirement. However, under the FMLA, all covered employers must display a general notice (FMLA poster) about the FMLA.
- **Employees:** Where the necessity for leave is foreseeable, an employee shall provide the employer with notice of leave “as is practicable.” Employers can request proof to substantiate the reason for leave.
- *Law goes into effect “no later than” 15 days after enactment of the Act (April 2)*

EMERGENCY FAMILY AND MEDICAL LEAVE ACT Tax Credits

- Employers subject to the requirements are entitled to a tax credit equal to the amount of the paid family and medical leave requirements paid by the employer.
- The tax credits for qualified wages are capped at \$200 per day and \$10,000 per calendar quarter per employee.
- The tax credits are applied against employer Social Security taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.

EMERGENCY PAID SICK LEAVE Tax Credits

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SCENARIO I

Sally has been employed full-time for 20 days at a call center which employs 40 people. Sally is not eligible to receive any paid time off under her employer's policies.

Sally has a sore throat and a fever of 100.7 and cannot report to work. Sally is waiting to be seen by her doctor. What benefits is Sally entitled to while she is not working?

- Emergency Paid Sick Leave – 80 hours at her regular rate
- Sally would not be entitled to EFMLA because she was not employed for at least 30 days prior to the first day of her leave AND because she does not have qualifying reason for leave.

SCENARIO 2

Sally has been employed full-time for 45 days at a call center which employs 40 people. As of today, Sally has accrued three (3) days of Paid Time Off under the employer's Policies.

The school where Sally's fourth-grade daughter attends is closed until the end of April. Sally is unable to work from home during this time. What benefits is Sally entitled to receive during this time?

- Emergency Paid Sick Leave – 80 hours at 2/3 her regular rate of pay
- Emergency Family and Medical Leave Act – up to 12 weeks of job protected leave
 - The first ten (10) days is unpaid (but could be paid at 2/3 her regular rate of pay under Emergency Sick Leave).
 - After the 10 days, Sally is paid at 2/3 her regular rate of pay
 - Sally may elect use her 3 days of PTO, but she can not be required to

KEY HEALTH PROVISIONS

- Requires insured and self-insured group health plans to provide coverage for COVID-19 diagnostic testing without cost sharing (including deductibles, copayments and coinsurance)
- Requires insured and self-insured group health plans to cover provider and facility costs associated with COVID-19 diagnostic testing visits



CARES Act

Small Business Administration Loans

Stay Tuned!

A FEW THINGS TO KEEP IN MIND

State and Local Laws

- Many states and local jurisdictions have their own paid sick days and family and medical leave laws, which may be in addition to these new federal requirements.
- Many states and locals are working quickly to amend their laws and/or add new requirements as well.

Questions?



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Thank You

