

Federal Family First Coronavirus Response Act

The law goes into effect April 1, 2020 and will remain in place until December 31, 2020.

Relevant topics:

- (1) Extends and expands the protections of FMLA job-protected leave for certain childcare-COVID-19-related absences, including requiring paid FMLA leave benefits.
- (2) Provides a new paid sick leave entitlement for certain COVID-19 related absences.
- (3) Provides tax credits to help employers defray the costs of paying these benefits.

EXPANSION OF FMLA

- I. The law expands the FMLA's reach to provide job protections and partial wage replacement for impacted employees by permitting eligible employee to use Emergency FMLA (EFMLA) leave related to a public health emergency for child-care related absences. Below are key considerations for employers related to the amendments:
 - The new law applies only to employers with fewer than 500 employees. Employees working for at least 30 days for a covered employer are eligible immediately to use leave. The DOL has the power to exclude employers with fewer than 50 employees where a hardship exemption applies.
 - Eligible employees may take up to twelve (12) weeks of job-protected EFMLA leave where they are unable to work or telework because of a need for leave to care for a son or daughter due to school or place of care has been closed, or their child-care provider is unavailable because of a public health emergency declared with respect to COVID-19- coronavirus.
 - The first 10 days of EFMLA leave is unpaid, but employees may elect to substitute accrued vacation, personal leave, or sick leave for the unpaid leave under this section. An employer may not require such substitution.
 - After the 10 days are exhausted, employers must pay the employee not less than two-thirds of the employee's regular rate of pay (as defined under the Fair Labor Standards Act ("FLSA")) for each day of FMLA leave taken thereafter, capped at \$200 per day and \$10,000 in the aggregate.
 - a) In situations where an employee's schedule varies from week to week, the employer shall use the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.

Job Restoration:

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As under the existing provisions of the EFMLA, employees taking public health emergency FMLA leave are entitled to be restored to their same or an equivalent position upon their timely return from leave. However, employers with fewer than 25 employees would not be required to comply with these job restoration requirements in connection with public health emergency EFMLA leave if the following conditions are met:

- The employee EFMLA.
- The employee's position when they began leave does not exist due to economic conditions or other changes in the employer's operating conditions that:
 - a) affect employment and
 - b) are caused by a public health emergency during the leave period; and
- The employer makes reasonable efforts to restore the employee to a position equivalent to one they held when leave began (*i.e.*, equivalent benefits, pay, terms and conditions of employment).

If reinstatement is not required because the above conditions are met, an employer would be required to make reasonable efforts to contact the employee if an equivalent position becomes available during the one-year period beginning on the earlier of:

- The date on which the qualifying need related to public health emergency concludes, or
- The date that is 12 weeks after the date on which the employee's public health emergency EFMLA leave commences.

In addition, the Secretary of Labor will have the authority to issue regulations excluding as well as exempting certain employers with fewer than 50 employees from coverage if imposing such requirements would jeopardize the viability of such employers' businesses.

An employer signatory to a multiemployer collective bargaining agreement may, consistent with its bargaining obligations and its collective bargaining agreement, fulfill its obligations by making contributions to a multiemployer fund, plan, or program based on the paid leave each of its employees is entitled to under such section while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken. As under the existing provisions of the FMLA, employees taking public health emergency EFMLA leave are entitled to be restored to their same or an equivalent position upon their timely return from leave.

NEW EMERGENCY PAID SICK LEAVE ENTITLEMENT

- II. The law provides a new paid sick leave entitlement to impacted employees, and also includes the Emergency Paid Sick Leave Act (EPSLA), which permits employees to use sick leave related to COVID-19, the key components of which are set forth below.

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- Like the FMLA expansion, this applies to employers with fewer than 500 employees. It may also exclude employers with fewer than 50 employees where a hardship exemption applies.
- These new sick leave amounts are in addition to and not in lieu of any other statutorily provided, or employer-provided paid sick leave benefits, and further, employers must permit employees to use COVID-19-related sick leave before other sick leave.
- These new amounts cannot be carried over into the new year, nor are they paid out at termination, resignation or other separation of employment.

Small businesses with fewer than 50 employees may be exempted from the paid leave requirements of FFCRA related to childcare (and none of the other bases for FFCRA leave) if:

- Doing so would raise expenses and financial obligations above available business revenue such that the employer would cease operating at a minimal capacity.
- The requesting worker's absence would pose a substantial risk to the employer's financial health or operations because of their specialized skills, knowledge of the business, or responsibilities; or
- The employer can't find enough able, willing, available, and qualified workers to perform the work of the employee requesting an absence.

Employers should document for their own records the reasons justifying their determination that this exemption applies.

Employees could use this sick leave where they cannot work or telework because:

- 1.They are 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 due to COVID-19-related concerns.
- 3.The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- 4.The employee is caring for someone who is subject to a quarantine or isolation order or who has been advised to self-quarantine.
- 5.The employee is caring for a child if the child's school or place of care is closed or the child-care provider is unavailable because of COVID-19 precautions.
- 6.The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

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Employers are required to pay an employee:

1. At his or her regular rate of pay up to a cap of \$511 per day and \$5,110 in the aggregate for sick leave use under reasons (1)-(3) above (employee quarantine or isolation order, self-quarantine recommendation or experiencing symptoms and seeking treatment).
 2. At 2/3rds his or her regular rate of pay capped at \$200 per day and \$2,000 in the aggregate for sick leave use under reasons (4)-(6) above (caring for others and additional government-specified conditions).
- There are separate provisions regarding this paid sick leave benefit for employees subject to a multi-employer collective bargaining agreement.

Employers must post a notice related to this section in a conspicuous place in the workplace. A model notice has been published by the Department of Labor and is available here: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

- The law also goes into effect April 1, 2020 and remains in effect until December 31, 2020.

An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under this section.

TAX CREDITS

- III. The law provides payroll tax credits to employers paying out leave benefits through 2020 to cover wages paid to employees while they take time off under the EFMLA and EPSLA. The payroll tax credit equals to 100% percent of qualified paid leave benefits paid by an employer subject to certain caps

Be mindful of parallel or overlapping leave and PTO requirements under applicable state and local laws.