

Paid Sick Leave & Tax Credit For Businesses On The Horizon As The Families First Coronavirus Response Act Is Signed Into Law

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On March 18, 2020, President Trump signed the Families First Coronavirus Response Act into law. This legislation is designed to make emergency appropriations and incorporate certain changes into law to respond to the COVID-19 pandemic. Among other things, the law requires immediate action by employers whose workforces are affected by the pandemic.

As businesses and individuals try to decipher and comprehend the impact and effect of COVID-19, this article addresses the implications that this newly enacted legislation will have in the employment sector.

This new law, which goes into effect on April 2, 2020, and applies going forward, requires certain employers to provide emergency paid leave for childcare obligations, as well as emergency paid sick leave. The law also includes refundable tax credits for employers that are required to offer emergency FMLA or paid sick leave, to help offset the burden of these new requirements.

Emergency Family and Medical Leave Act (“FMLA”)

The new law provides that private-sector employers with fewer than 500 employees, and covered public-sector employers, must provide up to 12 weeks of FMLA leave for “a qualifying need related to a public health emergency” to employees who have been on the payroll for at least 30 calendar days. This “qualifying need” is limited to circumstances where an employee is unable to work (or telework) due to a need to care for a child under age 18, if the child’s school or childcare has been closed or is unavailable due to a public health emergency.

The first 10 days of emergency FMLA leave may be unpaid. An employee may choose to substitute accrued vacation, personal, or sick leave during this time, but an employer may not require an employee to do so.

The remaining 10 weeks of FMLA leave must be paid, generally at two-thirds of the employee’s regular rate and calculated based on the number of hours the employee would otherwise be scheduled to work. The law limits this pay to no more than \$200 per day, and \$10,000 total.

Emergency FMLA leave is generally job-protected, which means that the employer must reinstate employees to their prior positions (or an equivalent) after their leave. The law includes an exception to this requirement for employers with fewer than 25 employees, if the employee’s position no longer exists following leave due to, for example, a dramatic decrease in business caused by the COVID-19 pandemic. In these circumstances, so long as the employer (a) makes a reasonable effort to restore the employee to the

employee's prior position or equivalent after the leave, and (b) makes a reasonable effort to contact the employee if an equivalent position becomes available if the employer is unable to initially restore the employee to his/her former position, the employer is exempt from the requirement of job restoration following a leave.

The Secretary of Labor may decide to exempt small businesses (defined as those with fewer than 50 employees) if the required leave would jeopardize the viability of their business. We anticipate regulations setting out the final rule on this possible exemption shortly.

The law also expressly provides that employers may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement.

These provisions will be in effect during this public health emergency only and will expire on December 31, 2020.

Emergency Paid Sick Leave

The law requires private employers with fewer than 500 employees, and covered public employers, to provide paid sick time to an employee who is unable to work (or telework) because: (1) the employee is 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 because of COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is caring for an individual subject or advised to quarantine or self-isolate; (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Unlike the emergency FMLA requirements, an employee is immediately eligible for this leave, regardless of how long the employee has been on payroll. In general, an employee is entitled to 80 hours of paid sick time (or, for workers who work less than full time, the typical number of hours they are scheduled to work in a two-week period). The leave entitlement cannot be carried over into the following year.

An employer cannot require that an employee take another form of sick leave before taking emergency paid sick leave under this statute.

Like the emergency FMLA provisions, the new law also grants the Secretary of Labor the authority to issue regulations to: (a) exclude certain health care providers and emergency responders from the definition of employee by, among other things, allowing them to opt out; (b) exempt small businesses with fewer than 50 employees from these requirements if they jeopardize the viability of a business as a going concern; and (c) ensure consistency between the paid family and paid sick standards and tax credits. Again, we

anticipate that these regulations will be released shortly, and will provide greater detail on the scope and applicability of this new law.

If an employee is taking sick leave because: (a) the employee is subject to a quarantine or isolation order; (b) has been advised by a health care provider to self-quarantine, or (c) is experiencing Coronavirus symptoms and seeking medical diagnosis, then the emergency paid sick leave is to be paid at the employee's regular rate of pay, or at the federal, state, or local minimum wage, whichever is greater.

If an employee is taking paid sick leave to care for another individual or child or because they are experiencing another substantially similar illness (as specified by HHS), then the emergency paid sick leave is to be paid at two-thirds the employee's regular rate.

The law limits this leave to \$511 per day (\$5,110 total) where leave is taken for an employee's own illness or quarantine; and \$200 per day (\$2,000 total) where leave is taken for care for others or school closures.

The law includes anti-retaliation provisions and provides that the failure to pay required sick leave will be treated as a failure to pay minimum wages in violation of the Fair Labor Standards Act. These provisions are also scheduled to expire on December 31, 2020.

Employers must also keep and post notices in a conspicuous location in the workplace of the requirements imposed by this legislation. The Secretary of Labor will be making sample notices available to employers within the next week.

Tax Credits

Employers who provide paid sick leave will be entitled to tax credits to offset the costs they incur to provide public health emergency leave and sick leave, including without limitation, a refundable tax credit worth 100% of qualified sick leave wages and qualified public health emergency leave wages paid by an employer for each calendar quarter through the end of 2020. Employers will also get credits to include the amounts paid toward an employee's health plan while they are on leave.

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