

Families First Coronavirus Response Act: What Employers Need to Know

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act ("FFCRA"). The bi-partisan economic stimulus act is effective from April 2, 2020 to December 31, 2020, and provides employees with additional wage continuation and leave benefits under certain circumstances relating specifically to the COVID-19 pandemic. It also provides tax credits to employers designed to offset the cost of the paid leave provided to employees, and includes provisions to shore up State unemployment funds, ensure continuing food benefits, and assure no-cost COVID-19 testing. This information addresses the employment-related aspects of the new law.

Emergency Paid Sick Leave

This is the first time the federal government has enacted a paid sick leave bill. Federal paid sick leave will be available to employees who work either for a private company/individuals employing less than 500 employees or at a public agency of any size. Employees of such entities (regardless of when they were hired) will be entitled to paid sick leave if they are unable to work (or telework) due to a need for leave because:

- The employee is subject to a Federal, State or Local quarantine or isolation order related to COVID-19.
- The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual who is subject to an order under paragraph 1 or has been advised to self-quarantine as described in paragraph 2.
- The employee is caring for his/her son or daughter if their school or place of care has been closed, or the paid childcare provider of such son or daughter is unavailable due to COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of HHS, in consultation with the Secretaries of the Treasury and Labor.

Employers of healthcare providers and/or emergency responders may elect to exclude those employees from federal paid sick leave.

For full-time employees, the duration of the paid sick leave is 80 hours. **For part-time employees**, paid sick leave should be provided for the number of hours equal to the hours such employee works on average over a two-week period.

The required amount of pay depends on the reason for the leave:

For reasons (1) - (3) above, pay shall not be less than the greater of the employee's regular rate of pay, or the minimum wage in effect for the employee in the applicable state or locality. In addition, the maximum required pay is \$511 per day up to an aggregate of \$5,110.

For reasons (4) - (6) above (i.e., caretaking), the required compensation is two-thirds of either the regular rate of pay or applicable minimum wage (whichever is greater). Moreover, the maximum required pay is \$200 per day up to an aggregate limit of \$2,000.

An employer need not pay out unpaid sick leave if an employee is terminated, resigns or retires.

The employer is prohibited from requiring an employee to search for or find a replacement prior to using paid sick leave. Employers are also prohibited from requiring the employee to use other paid leave before the federal paid sick leave benefit. Finally, the FFCRA prohibits retaliation against employees for taking a leave or instituting/participating in any proceedings related to the Act. Violations of the Act will be treated as a violation of the Fair Labor Standards Act - the federal wage and hour law.

The Act cannot be construed to diminish the rights or benefits that an employee is entitled to under any other federal, state or local law, CBA or existing employer policy. A conservative approach would be for employers to provide 80 hours of paid sick leave under the FFCRA in addition to the 40 hours of paid sick leave entitlement under the New Jersey Paid Sick Leave Act (or any other state's law) unless and until further regulatory guidance is provided by federal or state agencies. We note, however, that there are distinctions between the paid sick leave provided under New Jersey law and the FFCRA. For example, under the New Jersey law employees can elect to use paid sick leave for reasons that go beyond those provided for under the FFCRA, and can be required to meet a waiting period by the employer before using the time. In addition, New Jersey does not cap the required amount of compensation under its Paid Sick Leave Act.

Expansion of the Family and Medical Leave Act ("FMLA")

The FMLA has also been expanded to cover employees with a "qualifying need related to a public health emergency." Public health emergencies have already been declared with respect to COVID-19 by President Trump, as well as the governors of New York, New Jersey and Pennsylvania. Under the FFCRA, a "qualifying need" means the employee is unable to work (or telework) due to a need for leave to care for a son or daughter under the age of 18 if the child's elementary or secondary school or place of care has been closed, or their paid child care provider is unavailable, due to a public health emergency.

For COVID-19 FMLA leave, the eligibility requirements have been changed in two ways. First, there is no 50-employee threshold as would typically apply under the FMLA. Instead, employees who work for employers with less than 500 employees qualify for the 12-week leave. Second, the employees need only have worked for the employer for 30 days (not 12 months/1,250 hours as is the typical threshold) before they are eligible for the leave. Employees who are health care providers or emergency responders may be excluded from the leave benefit either by their employers or by a regulation (as may be issued by the Secretary of the Labor).

While the initial two weeks of COVID-19 FMLA leave are unpaid, the employee may elect to substitute other paid time off (including the two weeks of Emergency Paid Sick Leave) during those weeks of leave. During weeks 3 to 12 of the leave, the COVID-19 FMLA leave is paid. However, the required compensation for the leave is not a full pay, but rather cannot be less than two-thirds of the employee's

regular rate of pay. Critically, however, the required compensation shall not exceed \$200 per day and \$10,000 in the aggregate.

Although the established FMLA requirements apply with respect to job restoration at the end of the 12-week COVID-19 FMLA leave, there is one exception relating to employers with less than 25 employees. The employer need not offer restoration if the position held by the employee at the time leave commenced no longer exists due to economic conditions or other changes in the employer's operating conditions that affect employment and were caused by a public health emergency during the period of leave. Nonetheless, the employer must make efforts to restore the employee to an equivalent position (in pay, benefits, and other terms and conditions) to the position that no longer exists. Further, this obligation continues for one year following the date on which the qualifying need concludes or the date that is 12 weeks after the leave commenced (whichever date is earlier).