



Families First Coronavirus Response Act of 2020

Yesterday, the President signed the Families First Coronavirus Response Act of 2020 (the “Act”) which was passed by the U.S. Senate earlier in the day. The Act was passed to provide comprehensive relief to families and businesses impacted by the COVID-19 pandemic. The Act will be effective April 2, 2020. This advisory covers the employment-related provisions, the greatest interest of which are the paid sick leave and paid emergency family medical leave expansion provisions.



Biography

Emergency Paid Sick Leave

The Act requires private employers with fewer than 500 employees (and government employers) to provide up to 80 hours of paid sick leave (prorated for part time employees based on average hours worked) to employees to the extent that the employee is unable to work or telework due to the following circumstances:

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 due to concerns related to 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 who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
5. The employee is caring for a son or daughter because the child’s school or place of care has been closed or the child’s childcare is unavailable due to COVID 19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of the HHS in consultation with the Secretary of the

What is an employer required to pay an employee during leave? If an employee uses emergency paid sick leave for self-care (i.e., under circumstances 1, 2, or 3), the employer must pay the employee the higher of (a) the employee's regular rate of pay or (3) the local minimum wage. If an employee uses emergency paid sick leave to care for an individual (i.e. under circumstances 4, 5, or 6), then the employer must pay paid sick leave at two-thirds of the employee's regular rate of pay. Employers should take note that number 4 states "individual," which is broader than "family" typical for paid sick leave.

The Act has implemented a cap on what an employer is required to pay to employees receiving paid sick leave. These caps differ depending on whether the employee is receiving full wages or two-thirds wages. There is a cap of \$511 per day and an aggregate limit of \$5,110 for those receiving full wages (circumstances 1, 2, and 3) For circumstances 4, 5, and 6 (where the employee would be paid at a two-thirds rate), there is a \$200 cap per day, with \$2,000 aggregate.

Any caveats? Employers may not require employees to use other paid leave provided by the employer before using this bank of paid sick time for covered reasons, nor may employees be required to find a replacement to cover the time they will miss while using paid sick time. The program sunsets on December 31, 2020 and unused paid sick leave under the Act will not carry over. Employees are still required to give employers reasonable notice of the requested leave as practicable. Employers should consider following current policies in place with respect to reasonable notice. Employers are required to post a notice in a form to be released by the Department of Labor regarding these protections. At the time of this advisory, the posting was not yet available.

Are there possible exceptions? Yes. Employers of health care providers or emergency responders may elect not to provide this leave to those employees. The Act also provides that the Secretary of Labor may exempt businesses with fewer than 50 employees from paying for sick time taken due to school or daycare closures "when the imposition of such requirements would jeopardize the viability of the business as a going concern." Unless offering the leave is a true hardship, employers should not expect to receive such an exemption.

Are there employer penalties for non-compliance? Like Arizona's paid sick leave statute, discrimination or retaliation for exercising protected paid sick leave rights are prohibited and subject to penalties. Employers who fail to provide this paid sick leave or who terminate an employee for discriminatory reasons will be considered in violation of the FLSA and subject to the FLSA's penalties, including payment of back pay, liquidated damages and attorneys' fees.

Is there any relief for employers providing this leave? To ease some of the financial burden of compliance, the Act provides for a limited refundable employment tax credit equal to the amount that an employer pays to an employee (within the established caps) under this provision, to a maximum of ten days per employee for the year.

Family Medical Leave Act for Public Health Emergencies

The Act also provides for an Emergency Family and Medical Leave Expansion Act (the “E-FMLA”). The E-FMLA expands the protections of the Family and Medical Leave Act to add Public Health Emergency Leave. The expansion is effective through December 31, 2020, and provide additional paid leave to employees due to a public health emergency qualifying need (i.e., COVID-19).

What employees are eligible? The E-FMLA has expanded the definition of eligible employees for the limited purpose of public health emergencies. Employees who have been employed for at least 30 calendar days are eligible for E-FMLA. As with paid sick leave, employers of health care providers or emergency responders may exempt those employees from coverage.

What employers are covered? All employers with fewer than 500 employees are covered and required to provide this leave. Although existing FMLA provisions apply to employers with 50 or more employees, the E-FMLA provisions include businesses with fewer than 50 employees. And, employers with fewer than 25 employees are excused from the FMLA’s job restoration obligation if the employee’s position no longer exists due to economic conditions or other operational changes that affect employment and were caused by the public health emergency during the leave, provided that the employer makes a reasonable effort to restore the employee to an equivalent position and if such efforts fail contact the employee during the following year if an equivalent position becomes available.

What is a qualifying reason for leave? E-FMLA is available to employees who are unable to work or telework due to the need for leave to care for a son or daughter under 18 because the child’s school or daycare has been closed due to a public health emergency.

Are employees entitled to pay during E-FMLA leave? The Act provides for a combination of unpaid and paid leave. The first 10 days of E-FMLA may be unpaid, but an employee may elect (and an employer may require an employee) to substitute any accrued vacation, personal leave, or medical or sick leave for unpaid leave. For many employees, that leave period will be paid as a result of the Emergency Paid Sick Time Act. After 10 days, employers shall provide partial paid leave for each additional day of leave at an amount that is not less than two-thirds of an employee’s regular rate of pay for the number of hours the employee would otherwise be scheduled to work. For employees whose working hours fluctuate, the employer is allowed to take an average over a six-month period. As with the paid sick leave provision, the employee is required to give reasonable notice under the circumstances.

There are also caps in place on the amount an employer is required to pay to employees receiving E-FMLA. Paid E-FMLA may not exceed \$200 per day and \$10,000 in the aggregate.

Is there any relief for employers providing E-FMLA leave? To ease some of the financial burden of compliance, the Act provides for a limited refundable employment tax credit equal to the amount that an employer pays to an employee (within the established caps) under this provision, to a maximum of ten weeks per

employee for the year.

Conclusion

While this statute has been signed, there is still talk of amending the statute or passing additional legislation to address the issues arising as a result of the COVID-19 pandemic. The provisions of the Act may also overlap with the longstanding legal obligations under the Americans with Disabilities Act and Family Medical Leave Act. Employers need to understand the interplay of all applicable employment laws when making employment decisions in light of the COVID-19 pandemic. We encourage employers who have specific questions about the Act or other COVID-19 related employment issues to contact Jodi Bohr at jrb@tblaw.com or (602) 255-6082.

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