

Alert: Important Updates to Families First Coronavirus Response Act

Families First Coronavirus Response Act: A Comprehensive Summary

The Families First Coronavirus Response Act has two main components of immediate concern for a large segment of employers and employees:

- 1) The expansion of the federal Family Medical Leave Act (“FMLA”); and
- 2) The temporary establishment of a federal paid sick leave program. Both the paid FMLA and paid sick leave provisions apply to private employers with fewer than 500 employees. Both the expanded FMLA and paid sick leave laws expire on December 31, 2020.

EMERGENCY EXPANSION TO THE FAMILY MEDICAL LEAVE ACT

I. Coverage

- “Eligible employees” will be entitled to take FMLA leave “because of a qualifying need related to a public health emergency.”
- Unlike under the existing FMLA, which requires that an employee have worked for 12 months and 1,250 hours in the preceding 12 months, an “eligible employee” solely for purposes of public health emergency FMLA leave, includes employees employed for as few as 30 calendar days.
- The U.S. Secretary of Labor is authorized to issue regulations that would exempt from the definition of “eligible employees” entitled to public health emergency FMLA leave “certain health care providers and emergency responders.” A separate provision of the bill grants employers of employees who are health care providers or emergency responders the discretion to exempt them from the public health emergency FMLA leave protections altogether.

- For purposes of the public health emergency FMLA leave provision only, a “covered employer” will include employers that employ fewer than 500 employees. Accordingly, the public health emergency portions of the FMLA applies to employers with fewer than 50 employees (who are not currently covered by the FMLA and would not be covered by other provisions of the FMLA), but not to the largest employers who otherwise are covered by the FMLA. However, the U.S. Department of Labor is empowered to exempt businesses with fewer than 50 employees from the obligation to provide public health emergency FMLA leave “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

II. Qualifying Events

- Public health emergency FMLA leave may be taken when an employee is unable to work, or telework, due to a need for leave to care for a son or daughter under 18 years of age, if the minor child’s elementary or high school or place of care has been closed, or the minor child’s paid child care provider is unavailable, due to a public health emergency. In this context, “public health emergency” means “an emergency with respect to COVID-19 declared by a federal, state, or local authority.”

III. Payment Obligation

- The first 10 working days of public health emergency FMLA leave may be unpaid, but an employee may elect to substitute paid vacation, personal leave, or medical or sick leave for the unpaid 10-day period.
- If the public health emergency FMLA leave exceeds 10 working days, the balance of the public health emergency FMLA leave shall be paid at the rate of two-thirds (2/3) the employee’s regular rate of pay for their usual hours scheduled, up to a maximum of \$200/day or \$10,000 in the aggregate.

IV. Job Restoration

- Employees are required to provide as much notice of leave “as is practicable,” and are to be restored to their prior position or an equivalent position at the time their public health emergency FMLA leave is complete, unless:
 - (1) the employer employs fewer than 25 employees, and
 - (2) the employee’s position no longer exists “due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave,” provided that
 - (3) the employer makes reasonable efforts to restore the employee to an equivalent position and, if such efforts fail,
 - (4) the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the following year.

EMERGENCY PAID SICK LEAVE ACT

I. Qualifying Leave

- The Emergency Paid Sick Leave Act establishes a temporary federal paid sick leave program, which requires Employers to provide Employees with up to 80 hours of paid sick time (a prorated amount applies to “full-time” employees who work typically work less than 80 hours in a two-week period, and for part-time employees. The hours of paid sick time during this two-week period is based upon the hours an Employee typically is scheduled to work during a normal two week period) if the employee is unable to work or telework 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 health care 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 a quarantine or isolation order, or has been advised to self-quarantine due to concerns related to COVID-19;
 - The employee is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions;
 - The employee is experiencing any other substantially similar condition as declared by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor.
- The only exception to eligibility is for health care providers and emergency responders, whom Employers “may elect to exclude such employee from the application of” the paid sick leave protections.
 - Employers may not require Employees to find a replacement to cover the hours in which they use paid sick time, and the paid sick time shall be available to an Employees regardless of how long the Employee has been employed.

II. Coverage

- All public employers are included in the Act, however, only private employers with fewer than 500 employees are “covered employers.”
- The U.S. Secretary of Labor may exempt health care providers and emergency responders from coverage altogether.
- The Secretary may also exempt small businesses with fewer than 50 employees from the paid sick leave requirement only with respect to leaves for school and daycare closures “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

III. Payment Obligation

- If emergency federal paid sick leave is taken because of the employee’s own quarantine or isolation order or recommendation, or because of the employee’s own symptoms, the paid sick leave will be paid at the employee’s regular rate of pay or the applicable federal or state minimum wage, whichever is highest.
- If leave is taken to care for an individual subject to an isolation order or quarantine recommendation, or to care for a child whose school or daycare provider is closed, then paid sick leave shall be paid at the rate of two-thirds the employee’s regular rate of pay.
- Although 80 hours is the upper limit of paid sick leave, paid sick time ceases beginning with the employee’s next scheduled work shift following the termination of the need for paid sick time.
- The emergency paid sick leave program expires on December 31, 2020.
- Unlike FMLA leave, Employers may not require Employees to use other paid leave provided by the employer before using this bank of paid sick time for covered conditions.
- The paid sick leave protections are intended to expand and build up, not diminish the rights or benefits any Employee is entitled to under separate federal, state, or local law; collective bargaining agreement; or existing employer policy.

- Both the paid public health emergency FMLA leave provisions and paid sick leave provisions make employers eligible for limited payroll and self-employment tax credits to offset their respective costs.

IV. Consequences and Penalties

- The Act would impose notice obligations and prohibit discriminatory and retaliatory acts against employees who exercise their paid sick leave entitlement.
- Violations of the federal paid sick leave requirement will be treated like a violation of the Fair Labor Standards Act, and will subject employers to liquidated damages (2x actual damages) and civil money penalties

TEMPORARY PAYROLL TAX CREDIT

The Act provides employers with a temporary payroll tax credit for paid sick leave, paid family leave, as well as similar refundable credits for the self-employed.

I. Paid Sick Leave Payroll Tax Credit

- The Act provides payroll tax credits against taxes imposed under FICA and Railroad Retirement Act taxes (if applicable) for qualified sick leave wages up to \$200 per day for each applicable calendar quarter where an employee incurs a Qualifying Leave (as set forth above) that relates to caring for a child or family member. The credit increases to \$511 in the case of any day any portion of which is paid sick time that is either (1) a day the employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19; (2) a day the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) a day the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The payroll tax credit is available for a maximum of 10 days per calendar quarter, subject to reduction for days taken into account for all preceding calendar quarters.
- The amount of the credit is increased by the employer's "Qualified Health Plan Expenses" that are allocable to the qualified sick leave wages. The term "Qualified Health Plan Expenses" generally means amounts paid or incurred by the employer to provide and maintain a group health plan.
- If an employer utilizes this credit, the employer may not take the FMLA credit specified under Internal Revenue Code Section (Code) 45S.
- The effective date of this credit commences during the 15-day period beginning on the enactment of the Act, March 19, 2020, and ending on December 31, 2020.
- The Secretary of Treasury shall prescribe regulations or other guidance as may be necessary to carry out the purpose of this credit.

II. Paid Family Leave Payroll Tax Credit

- Employers may take a payroll tax credit against taxes imposed under FICA and Railroad Retirement Act taxes (if applicable) up to \$200 per day for each employee who qualifies for family leave wages under the Act. The maximum credit that can be taken shall not exceed \$10,000 for all calendar quarters.
- The amount of the credit is increased by the employer's "Qualified Health Plan Expenses" that are allocable to the qualified family leave wages. The term "Qualified Health Plan Expenses" generally means amounts paid or incurred by the employer to provide and maintain a group health plan.
- Please note that if an employer utilizes this credit such employer may not take the FMLA credit specified under Internal Revenue Code Section (Code) 45S.

II. Self-Employed Tax Credit

- The Act provides a corresponding credit for self-employed business owners for both sick leave and FMLA leave. The sick leave credit is limited to the sick-leave equivalent amount, which is equal to the number of days that the individual is unable to perform services with respect to which such individual would be entitled to sick leave multiplied by the lesser of (1) \$200 (\$511 in the case of any day any portion of which is paid sick time that is either (1) a day the individual is subject to a Federal, State or local quarantine or isolation order related to COVID-19, (2) a day the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or (3) a day the individual is experiencing symptoms of COVID-19 and seeking a medical diagnosis) or (2) 67% (100% if the individual has a leave that qualifies for the \$511 increase in the described herein)) of the average daily self-employment income. The FMLA credit is available for a maximum 50 days in the amount of the lesser of: a) \$200, or b) 67% of the average self-employment income applicable to the business owner.

III. Employer FICA Exclusion

- Any paid sick leave and family medical leave will not be considered wages subject to the 6.2% FICA tax.

We hope the above information helps you to understand and implement these changes. We know this is a great deal of change and information to process so quickly, together with all of the other immediate changes that are taking place right now in our everyday lives. We are here to help you and your company. Please let us know what we can do for you to help with any of the above, and with the undoubtedly many questions which will arise in the days ahead while managing your company and your employees.

Practices

- Labor & Employment
- Tax & Employee Benefits
- Crisis Response Team