

March 24, 2020

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

As a response to the Coronavirus, President Trump signed the Families First Coronavirus Response Act (the “Act” or “FFCRA”) on March 18, 2020. The Act is effective April 2, 2020 and expires December 31, 2020. As a result:

- (a) school and childcare facility closures are added to the reasons for which an employee may take leave under the Family and Medical Leave Act (“FMLA”), FMLA coverage is expanded to more employers, and the leave is partially paid; and**
- (b) employers are required to pay paid leave to employees that are affected by the Coronavirus in certain ways under the “Emergency Paid Sick Leave” section of the Act.**

The following information is intended to assist employers navigate the Act. Note that regulations for the Act will not be published until April of 2020, so the information provided below is subject to change.

EXPANSION OF THE FMLA:

General Information:

The FMLA before the FFCRA:

Previously, the FMLA required employers with more than 50 employees to provide eligible employees with up to 12 weeks of unpaid leave for certain conditions:

- For incapacity due to pregnancy, prenatal medical care, or childbirth;
- To care for the employee’s child after birth or placement for adoption or foster care;
- To care for the employee’s parent, spouse, or child who has a qualifying serious health condition;
- For a qualifying serious health condition that makes the employee unable to perform his/her job;

- For certain qualifying exigencies resulting from a military servicemember’s deployment to a foreign country.

In addition, employees may take up to 26 weeks to care for a servicemember who was injured or became ill as a result of their military service.

To be eligible for existing FMLA leave, an employee must have worked for the employer for 12 months, have worked at least 1,250 hours during the 12 month period immediately preceding the date the leave is to begin, and be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite (the “75 mile rule”).

The FMLA after the FFCRA:

- *Note: these provisions are applicable to all employers with fewer than 500 employees other than those employers specifically excepted (explained below).*

The Act expands coverage by the FMLA to employers with fewer than 500 employees. Employees are eligible for FMLA coverage if they have worked for at least 30 days prior to the leave effective date. The 75 mile rule is no longer applicable.

Under the Act, an employee may take up to 12 weeks of job-protected leave in order to care for the employee’s child (under age 18) if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

The first ten days of the emergency FMLA leave may be unpaid. During that time an employee may substitute accrued paid leave. After ten days have elapsed, the employer must generally pay full-time employees at two-thirds the employee’s regular rate of pay for the employee’s regularly schedule hours.

The pay is limited to \$200 per day and \$10,000 in the aggregate.

Payment for employees who work part time or irregular hours would calculate the average number of hours worked for the six months prior to the emergency FMLA. If an employee has worked at least 30 days, but less than six months, employers should use the expected average number of hours that the employee agreed to work upon hire.

Employers with at least 25 employees are required to return any employee who has taken emergency FMLA to the same or an equivalent position with equivalent employment benefits, pay, and any other terms and conditions of employment.

Employers with fewer than 25 employees are excluded if the employee’s position no longer exists; however, the employer must make reasonable attempts to return the employee to an equivalent position and continue those efforts for one year after the leave.

Employers excepted:

- Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability **if the leave requirements would jeopardize the viability of the business as a going concern.**

Note: this is a suggested exemption in the Act. It leaves this exemption to the discretion of the Secretary of Labor when it drafts the regulations for the Act.

- Employers of employees who are health care providers or emergency responders may elect to exclude such employee from the application of this subsection.

Note: this is specifically provided as an exception in the Act.

Note: Under FMLA Sec. 101(6):

(6) HEALTH CARE PROVIDER.--The term “health care provider” means--

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

More detailed information about who qualifies as a “health care provider” is available at: https://webapps.dol.gov/elaws/whd/fmla/3.aspx?Glossary_Word=PROVIDER.

Tax credits:

Amounts paid for emergency FMLA are eligible for a payroll tax credit for the full term of an employee’s additional leave up to 12 months permitted under the FMLA emergency expansion. The tax credit is limited to \$200 per day and \$10,000 per employee.

EMERGENCY AND PAID SICK LEAVE UNDER THE ACT:

- *Note: these provisions are applicable to all employers with fewer than 500 employees other than those employers specifically excepted (explained below). Furthermore, they apply without regard to the number of employees within a 75-mile radius.*

General Information:

In the event an employee is unable to work for any of the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - Note: the Mayor’s “Hunker Down Order” (EO-03) that is effective as of 10:00 p.m. on Sunday, March 22, 2020, does not appear to qualify as a quarantine or isolation “order.”
2. The employee has been advised by a health care provider to self-quarantine related to COVID-19;
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. The employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. The employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury;

*Then employers with fewer than 500 employees **may** have to pay:*

- Employees with less than 30 days on the job: up to 2 weeks of PTO.
- Employees with more than 30 days on the job: up to an additional ten weeks of PTO (12 weeks total).

Employers excepted:

- Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability **if the leave requirements would jeopardize the viability of the business as a going concern.**

Note: this is a suggested exemption in the Act. It leaves this exemption to the discretion of the Secretary of Labor when it drafts the regulations for the Act.

- Employers of employees who are health care providers or emergency responders may elect to exclude such employee from the application of this subsection.

Note: this is specifically provided as an exception in the Act.

Note: FMLA Sec. 101(6) is the relevant definition of employee and it says:

(6) HEALTH CARE PROVIDER.--The term “health care provider” means--

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

More detailed information about who qualifies as a “health care provider” is available at: https://webapps.dol.gov/elaws/whd/fmla/3.aspx?Glossary_Word=PROVIDER.

Summary Table on payment requirements:

Abbreviations: FT = full time; PT = part time.

Reason for Leave	Hours for which employee is Eligible: FT employee	Hours for which employee is Eligible: PT employee	Rate of Pay	Cap
1. Gov’t mandated quarantine or isolation order related to COVID-19	80 hours	Average number of hours worked over a two-week period	Higher of regular rate or minimum wage	\$511/day and \$5,110 over the two-week period
2. Employee advised by health care provider to self-quarantine related to COVID-19	80 hours	Average number of hours worked over a two-week period	Higher of regular rate or minimum wage	\$511/day and \$5,110 over the two-week period
3. Employee experiencing COVID-19 symptoms and seeking diagnosis	80 hours	Average number of hours worked over a two-week period	Higher of regular rate or minimum wage	\$511/day and \$5,110 over the two-week period
4. Employee caring for individual subject to an order described in (1) or self-quarantine as described in (2)	80 hours	Average number of hours worked over a two-week period	Higher of 2/3 of their regular wage or 2/3 of the minimum wage	\$200/day and \$2,000 over the two-week period
5. Employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19	12 weeks	Number of hours employee is normally scheduled to work over 12 weeks	Higher of 2/3 of their regular wage or 2/3 of the minimum wage	\$200/day and \$12,000 over the 12-week period (\$2,000 of paid sick leave and \$10,000 under the FMLA)
6. Any other substantially similar condition specified by the Secretary of Labor	80 hours	Average number of hours worked over a two-week period	Higher of 2/3 of their regular wage or 2/3 of the minimum wage	\$200/day and \$2,000 over the two-week period

Paid sick time does not carry over to the next year. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment.

An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the first two weeks of partial paid leave under this section.

Penalties:

An employer who does not pay the sick leave required under the Act or who takes leave in accordance with the Act will be subject, in addition to other possible penalties, a fine of not more than \$10,000 and/or imprisonment of not more than six months.

Either the Secretary of Labor or the employee may also bring a lawsuit for the unpaid leave, an equal amount as liquidated damages, equitable relief, attorney fees and costs, and for injunctive relief.

Tax Credits:

The employer will receive a payroll tax credit for the first ten days of an employee’s paid sick leave. The tax credit is limited to \$511 per day or \$200 per day if the employee utilizes time to care for a son or daughter or other individuals permitted above, or because the employee is experiencing “substantially similar conditions.”

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