



CLIENT ALERT (Updated March 27, 2020)

RE: **Emergency Paid Sick Leave and Expanded FMLA Benefits:** Two new mandates that affect small and very small employers under the new Families First Coronavirus Response Act

Responding to the current national health emergency and in an effort to mitigate the effects of COVID-19 on the US workforce, **effective as of April 1, 2020**, Congress has:

1. mandated a new emergency paid sick leave benefit for employees of thousands of small and very small businesses who can't work because they are directly affected by COVID-19 or are caring for another affected by it; and
2. required – for the first time – businesses with fewer than 50 employees to provide partially paid leave under the Family Medical Leave Act ("FMLA") for employees who can't work because the school or place of care of their children is closed due to the national emergency.

The new Families First Coronavirus Response Act applies only to businesses with fewer than 500 employees. That's not a typo. Under prior law, the FMLA applied only to businesses with 50 or more employees, but for purposes of the temporarily expanded benefit under the FMLA and for the duration of the new law (which expires December 31, 2020), all businesses with fewer than 500 employees must afford the expanded leave benefit. Likewise, emergency paid sick leave for both full and part-time employees is required of all businesses under the 500-employee threshold.

The act authorizes the Department of Labor to, by regulation, exempt businesses with fewer than 50 employees if complying with the new act's provision would jeopardize the business's viability. At the moment, there is no guidance on whether those regulations will be issued or what they may look like if they are. Employers of health care providers or emergency responders may exempt those employees from leave under both initiatives, but the definition of health care provider is narrow and includes only higher-level providers. Emergency responders are not defined in the act.

Emergency Paid Sick Leave

Reasons for Leave. Effective **April 1, 2020**, covered employers must offer 80 hours of paid leave to full time employees and a lesser calculated number of hours to part time employees who:

- (a) are subject to a governmentally imposed quarantine or isolation due to COVID-19;
- (b) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (c) are experiencing symptoms of COVID-19 and are seeking a medical diagnosis;

- (d) are caring for another individual (not necessarily a family member) who is subject to a governmentally imposed quarantine or isolation due to COVID-19 or who has been advised to self-quarantine;
- (e) are caring for the employee's child whose school has been closed or place of care made unavailable due to COVID-19 precautions; or
- (f) are experiencing similar effects specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor.

Part-time employees are entitled to leave equal to the average number of hours worked in a two week period, or – for part-timers who work a widely variable schedule – the average hours worked over the preceding 6 months or (if they have not worked over that period) the hours they were reasonably expected to work at the time of hire. The act directs the Secretary of Labor to issue guidelines on this within 15 days of enactment.

Paid Leave and Limits. For employees taking leave for any of the reasons in (a) – (c) in the list above, leave will be paid at the employee's regular rate of pay, subject however to limits of \$511 per day and \$5,110 in total. Employees seeking leave for the reasons listed in (d) – (e) will be paid leave at 2/3 of their regular rate of pay, subject to limits of \$200/day and \$2,000 total.

Eligible Employees. All full and part time employees affected by any of the above events are eligible for leave regardless of how long they have been employed. Employers cannot retaliate against an employee who seeks or takes leave under the new law.

Coordination with Existing Sick Leave, PTO, or Similar Benefits. The act prohibits an employer from requiring an employee to use up existing vacation, PTO, sick, or other leave benefits before taking emergency leave under the act. The emergency leave benefit is thus *in addition to* any other vacation, sick, or PTO benefit offered by an employer.

Notification. Employer may not require advance notice prior to the first workday on which the employee takes paid leave under the act, but may – after the first workday on which the employee receives paid leave – require reasonable notice from the employee to continue the leave. Employers are required to post a notice of benefits available to employees under the act; the poster is to be issued by the Department of Labor by March 25.

Emergency FMLA Expansion

Reason for and Duration of Leave. An employee unable to work (including remotely) due to the need to care for the employee's child who is under 18 and whose school or place of care is closed because of the COVID-19 public health emergency may take up to 12 weeks of leave.

Eligible Employees. Only employees who have worked for the employer for at least 30 days are entitled to take leave under the expanded FMLA provisions.

Paid/Unpaid. FMLA leave is ordinarily unpaid, however, for this expanded temporary emergency benefit, only the first 10 days of leave are unpaid. The employee may use any existing vacation or PTO benefits or accruals during this first 10 days. Thereafter, the employee

is entitled to receive pay at 2/3 of his or her regular rate of pay, subject to limits of \$200 per day and \$10,000 in total.

Restoration of Position. Employers with 25 or more employees must reinstate an employee returning from leave to the position he or she held when leave commenced or to an equivalent position. Employers with fewer than 25 employees must also reinstate, unless the position no longer exists due to economic conditions or other effects of the public health emergency. In that case, the employer must use reasonable efforts to restore the employee to an equivalent position. If those efforts fail, the employer must make reasonable efforts for not less than a year to notify that employee if an equivalent position becomes available.

Notification. Employees are required to provide employers with "such notice of leave as is practicable." Eligible employees may take leave beginning on **April 1, 2020**, though if their need to start leave on that date is foreseeable, they should provide "notice...as practicable."

Employer Reimbursement for Leave Paid to Employees – Tax Credits

Wages paid by an employer to employees under both the emergency sick leave provisions and the expanded FMLA paid leave provisions are themselves not subject to the 6.2% social security tax, and the employer is entitled to a quarterly tax credit against the employer portion of social security taxes it would otherwise owe to offset all of the wages it pays to employees taking leave under the new act's provisions. Self-employed individuals are also provided the tax credit with respect to the equivalent emergency sick leave or qualified FMLA amount.

Limits in the act may affect the timing of an employer's recovery of benefits it pays to employees under the new law. In taking the credit with respect to emergency sick leave wages, the employer is limited to \$200 or \$511 per day per employee, depending upon the reason the employee took leave; likewise the credit with respect to expanded FMLA benefits is limited to \$200 per day per employee and to \$10,000 in the aggregate per employee. In any event, however, the employer cannot claim a credit in any quarter in excess of all of the employer portion of the social security taxes that it owes for all of its employees during that quarter.

(Note: this version is updated as of March 27, 2020, to reflect new DOL advice establishing April 1, 2020 as the effective date of the act.) This is a short summary of two significant features of a complex and hurriedly-written statute. Among its other provisions, the act bolstered funding to states for unemployment insurance, and required health insurers to cover the cost of diagnostic testing for COVID-19. We're all dealing daily with new realities when it comes to the national health emergency. Please share this information with your clients, non-profits you work with, or others you think may benefit from it. If you or your clients have questions we invite you to reach out to [Lee Keeling](#) or [Donna Grafe-Tucker](#) in our Business Problems and Transactions practice.

Best regards,

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