

The Families First Coronavirus Response Act: What Employers Need to Know

The Bottom Line

- *With the likely enactment of the Families First Coronavirus Response Act, mandated school closures and the current state of the pandemic in the United States, employers must get ready to provide up to two weeks of additional paid sick leave and 12 weeks of partially-paid, job-protected leave to employees as a result of the impact of COVID-19.*

On March 14, 2020, the House passed the Families First Coronavirus Response Act (the Act), which the Senate is expected to approve in sum and substance sometime this week. President Trump has expressed approval for the legislation, which will go into effect 15 days after the Act is signed into law and will continue through December 31, 2020.

Among other things, the Act, which applies to employers with 500 or fewer employees (Covered Employers) will:

1. Significantly expand the federal Family and Medical Leave Act (FMLA) to provide up to 12 weeks of public health emergency leave for most employees, some of which must be paid; and
2. Require employers to provide up to two weeks of paid sick leave due to the effects of coronavirus.

Below is a summary of the key provisions of the Act that will immediately impact Covered Employers.

Temporary Expansion of the FMLA to Include Public Health Emergency Leave for Coronavirus-Related Absences

The FMLA currently requires employers with 50 or more employees to provide 12 weeks of job protected leave for covered medical and family leave reasons to certain eligible employees. The Act **expands** the FMLA to require Covered Employers to provide all employees who have been employed for at least 30 calendar days with the right to take FMLA leave for any of the following public health emergency-related reasons (Public Health Emergency Leave):

1. To comply with a health care provider or public official's recommendation or order that the employee's presence at work would jeopardize the health of others due to the employee's exposure to coronavirus or exhibition of coronavirus symptoms.
2. To care for a covered family member whose presence in the community has been deemed by a health care provider or public official to jeopardize the health of others due to the family member's exposure to coronavirus or exhibition of coronavirus symptoms.
3. To care for the employee's child because their school or place of care has been closed or their childcare provider is unavailable due to coronavirus.

The first 14 days of Public Health Emergency Leave can be unpaid, though an employee may elect, but cannot be required, to have such leave paid by substituting any accrued vacation, paid time off (PTO) or paid sick leave. After the initial 14 days, the Public Health Emergency Leave must be paid by the employer at 2/3rds of the employee's regular rate of pay. Notably, there is no compensation cap set forth for such paid leave. The Act also includes specific formulas for calculating pay for employees with varying weekly schedules.

Under the FMLA, an employee is typically guaranteed job-reinstatement to the same or an equivalent position at the end of their leave. Under the Act, however, the job restoration obligation does not extend to employers with fewer than 25 employees who take Public Health Emergency Leave so long as:

1. The employee's position no longer exists due to economic conditions or other changes in operating conditions due to a public health emergency;
2. The employer made a reasonable effort to restore the employee to an equivalent position at the conclusion of leave; and
3. The employer makes a reasonable effort to contact the employee in the 1-year period after the applicable leave if the equivalent position becomes available.

The Act also gives the Department of Labor the **authority to issue regulations** exempting certain employers from the Public Health Emergency leave obligations, including small business with fewer than 50 employees, if the requirements will jeopardize the business' viability, as well as certain health care providers and emergency responders. Notably, however, the exemptions themselves are not part of the Act.

Paid Sick Leave

The Act requires Covered Employers to provide full-time employees with 80 hours of paid sick time for the following covered reasons:

1. To self-isolate because the employee is exposed to coronavirus.
2. To obtain a medical diagnosis or care based on experiencing coronavirus symptoms.
3. To comply with a health care provider or public health official's recommendation or order that the employee's presence would jeopardize others' health because of the employee's exposure to or symptoms of the coronavirus.
4. To care for or assist a covered family member who:
 - Is self-isolating because of their diagnosis with coronavirus,
 - Is experiencing coronavirus symptoms and needs to obtain medical diagnosis or care, or
 - A health care provider or public health official has determined that the family member's presence in the community would jeopardize the health of others due to the family member's exposure to or exhibiting symptoms of coronavirus.
5. To care for the employee's child if the child's school or place of care has closed, or the child's care provider is unavailable, due to coronavirus.

Part-time employees must receive pro-rated paid sick time equal to the average number of hours the employee works over a two week period. The paid sick time must be paid at the employee's regular rate of pay, except in the case of the care for the employee's family member or child, in which case the pay must

be at two-thirds of the employees' regular rate of pay. Within 15 days of the Act's enactment, the Department of Labor will issue guidelines to assist employers in calculating the amount of paid sick time paid to employees.

Paid sick time under the Act must be made available for immediate use regardless of how long the employee has been employed. It does not carry over to 2021 (under the Act the benefit only extends through 12/31/20) and does not have to be paid out upon termination of employment. Employers cannot require that employees search for or find a replacement to cover their time off as a condition of using paid sick time. After the first workday that an employee receives paid sick time, employers may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.

Notably, the additional paid sick leave granted to employees under the Act is **in addition** to any other paid time off employers already provide. Employers, therefore, must be aware that even if they already provide paid sick time based on local requirements, or general paid time off or vacation policies to cover sick-related absences, they must provide the Act's paid sick leave in addition to their already existing time off policies. The Act also specifies that employers **cannot** adjust such policies prior to the Act's effective date to avoid extending the amount of total paid sick time they are required to give to employees under the Act. Further, employers **cannot** require that an employee use other paid time off prior to using paid sick time under the Act.

Employers will have to post a notice on their premises in a conspicuous place which informs that seven days after the Act's enactment, the Department of Labor will issue a statement summarizing the requirements of the Act. Employers who have shut down offices or begun to allow employees to work remotely should consider disseminating the notice electronically given that many employees are already working remotely in the effort to combat the spread of the pandemic. The Act includes anti-retaliation provisions, and any employer who violates the Act's paid sick time obligations will be deemed to have violated the federal Fair Labor Standards Act (FLSA) and will be subject to the FLSA's penalties, including liquidated damages and attorney's fees.

Note that the Act also ensures that employees who work under a multiemployer collective agreement and whose employers pay into a multiemployer plan are provided with leave and paid sick time.

Tax Credits to Employers Who Pay Out Paid Sick and Paid Family and Medical Leave

The Act includes refundable tax credits for employers providing Paid Sick Leave and Paid Family and Medical Leave under the Act. Specifically, Covered Employers can take a credit against the Federal Insurance Contributions Act (FICA) taxes they pay. These refundable credits apply with respect to wages paid beginning within 15 days of the passage of the Act and ending on December 31, 2020.

The credits are discussed in more detail below.

Payroll Credit for Paid Sick Leave

Each quarter, employers can take 100-percent of the qualified sick leave wages paid by such employer during the quarter as a credit against the employer portion of the social security tax for such quarter, subject to certain limitations, depending on the type of leave:

- For amounts paid to employees caring for a family member or for a child whose school or place of care has been closed, with \$200 being the maximum amount of wages per employee per day taken into account for purposes of determining the credit.

- For amounts paid with respect to employees who must self-isolate, obtain a diagnosis or comply with a self-isolation recommendation with respect to coronavirus, this amount is increased to \$511 per day.
- Certain limitations apply, including that the aggregate number of days taken into account per employee may not exceed the excess of 10 over the aggregate number of days taken into account for all preceding calendar quarters.

Payroll Credit for Paid Family Leave

Each quarter, employers can take 100-percent of the qualified FMLA wages paid by such employer during the quarter as a credit against the employer portion of the social security tax for such quarter, subject to certain limitations, including:

- The maximum per employee amount of wages taken into account for purposes of determining the credit is \$200 per day. In no event may the wages taken into account for any individual exceed \$10,000 in the aggregate with respect to all calendar quarters.

In addition to the credit, any wages required to be paid for Paid Sick Leave and Paid Family and Medical Leave are not subject to FICA taxes.

Other Highlights of the Act

The Act will also:

- Enable states to expand unemployment benefits eligibility and availability;
- Significantly increase funding for coronavirus diagnostic testing;
- Increase access to coronavirus testing to be paid for by private health plans (including the cost of a provider, urgent care center and emergency room visit in order to receive testing);
- Waive cost sharing requirements by private health plans, including self-insured plans, for coronavirus testing;
- Waive Medicare cost sharing for coronavirus-related medical visits;
- Allow Medicaid to cover testing; and
- Expand nutrition assistance programs and funding to support low-income and elderly people during the coronavirus pandemic.

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