



Families First Coronavirus Response Act

An Analysis of Paid FMLA and Paid Sick Leave Required by the Families First Coronavirus Response Act (H.R. 6201) Passed by Congress and signed by the President on March 18, 2020

I. Emergency Family and Medical Leave Expansion Act

- Public Health Emergency Leave – The Act adds this as a category of FMLA leave, which is triggered when an employee is unable to work (or telework) due to a need for leave to care for the employee’s son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable because of a public health emergency. This new category of leave fits into an employee’s general 12 week FMLA leave entitlement.
- Public Health Emergency – defined as an emergency with respect to COVID–19 declared by a Federal, State, or local authority.
- Child Care Provider - a provider who receives compensation for providing childcare services on a regular basis.
- School – an elementary or secondary school.
- Covered Employee for Public Health Emergency Leave - an employee who has been employed for at least 30 calendar days by the employer.
- Covered Employer for Public Health Emergency Leave – Any public employer with at least 1 employee and any private employer with fewer than 500 employees.
- Paid Leave Requirements for Public Health Emergency Leave:
 - The first 10 days of leave is unpaid, but an employee may elect to use any accrued paid time off (vacation or sick leave) during these 10 days.
 - After 10 days, the remainder of the leave is paid as follows:
 - Pay Rate - An amount not less than 2/3 of an employees’ regular rate of pay under the Fair Labor Standards Act (FLSA) multiplied by the number of hours the employee would otherwise be normally scheduled to work per day.
 - Pay Cap - The paid leave is capped at \$200/day and \$10,000 in the aggregate
 - Variable Hour Employees shall be paid 2/3 of their regular rate of pay under the FLSA multiplied by the average number of hours that the employee was scheduled per day (including leave hours of any type) over the 6-month period prior to the employee taking public health emergency leave. If an employee did not work over

such a period, then the pay shall be 2/3 of the employee's regular rate multiplied by the expected hours per day at the time of hiring.

- Notice – If the need for leave is foreseeable, the employee shall provide the employer with such notice as is practicable.
- Restoration to Position – the general job restoration provisions of the FMLA still apply to employees on public health emergency leave, except for the following:
 - Employers with fewer than 25 employees do not have to restore an employee on public health emergency leave to their prior position if:
 - the employee's position no longer exists following leave because of operational changes caused by a public health emergency such as a dramatic downturn in business related to the COVID-19 pandemic;
 - the employer makes reasonable efforts to restore the employee to an equivalent position; and if reasonable efforts fail
 - the employer makes reasonable efforts to contact the employee if an equivalent position becomes available within the earlier of the 1-year period from the date on which the employee no longer needs public health emergency leave or 12 weeks after the employee's public health emergency leave begins.
- Employee Exclusions – An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from public health emergency leave.
- Exemptions Granted by the United States Department of Labor (DOL) – the United States Secretary of Labor has the authority to grant exemptions as follows:
 - to exclude certain health care providers and emergency responders from the definition of eligible employee; and
 - to exempt small business with fewer than 50 employees from the requirements to grant public health emergency leave when the imposition of such requirements would jeopardize the viability of the business as a going concern.
- Liability Exemption – Employers with fewer than 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year shall not be subject to civil money damages under the FMLA in an action brought by an employee for violation of these new public health emergency provisions of the FMLA. However, the DOL may still pursue such damages against a violating employer.
- Effective Date – no later than 15 days of enactment which was March 18, 2020.
- Sunset Provision – The Emergency Family and Medical Leave Expansion Act sunsets December 31, 2020.

II. Emergency Paid Sick Leave Act

- Covered Employer - Any public employer with at least 1 employee and any private employers with fewer than 500 employees.

- Covered Employee – Any employee as defined by the federal Fair Labor Standards Act (FLSA) if the employee is unable to work (or telework) due to a need for leave because:
 - (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 seeking a medical diagnosis.
 - (4) The employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
 - (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

- Paid Sick Time Requirements
 - Full-Time Employees – 80 hours at an employee’s regular rate of pay under the FLSA.
 - Part-Time Employees - a number of hours equal to the number of hours that such employee works, on average, over a 2-week period at an employee’s regular rate of pay under the FLSA.
 - Variable Hour Employees – a number of hours per day over a 2-week period equal to the average number of hours that the employee was scheduled per day (including leave hours of any type) over the 6-month period prior to the employee taking paid sick leave under this Act at the employee’s regular rate of pay under the FLSA. If an employee did not work over such a period, then the expected hours/day at the time of hiring at the employee’s regular rate of pay under the FLSA.
 - Paid Sick Time is Supplemental – An employee may use this paid sick time prior to and in addition to any other leave benefits provided by an employer, and an employer may not require otherwise.
 - No Waiting Period – Employees may immediately use this paid sick time when needed regardless of how long they have worked for an employer.
 - Pay Cap - \$511/day and \$5,110 in the aggregate for leave related to (1), (2), and (3) noted above and \$200/day and \$2,000 in the aggregate for leave related to (4), (5), and (6) noted above.

- Notice - After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

- No Carryover – Paid sick time under this section shall not carry over from one year to the next.

- Required Notice – The DOL will be providing a notice about employees’ rights to this paid sick leave, and employers are required to post it.

- Employee Exclusions – An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this Emergency Paid Sick Leave Act.
- Anti-Retaliation Provision – it is unlawful for an employer to discharge, discipline, or in any other manner discriminate against any employee
 - who takes paid sick leave under this Act; or
 - who has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding.
- Enforcement – An employer who fails to pay sick leave under this Act will be in violation of failing to pay minimum wages under the FLSA. An employer who retaliates against an employee for exercising their rights under this Act will be in violation of the anti-retaliation provisions of the FLSA. All such violations will be subject to the enforcement provisions, penalties, and damages permitted under the FLSA, including suits by a single employee or a collective action by multiple employees.
- Exemptions Granted by the federal Department of Labor (DOL) – the United States Secretary of Labor has the authority to grant exemptions as follows:
 - to exclude certain health care providers and emergency responders from the definition of eligible employee; and
 - to exempt small business with fewer than 50 employees from the requirements to grant sick paid sick leave when the imposition of such requirements would jeopardize the viability of the business as a going concern.
- Effective Date – no later than 15 days of enactment which was March 18, 2020.
- Sunset Provision – The Emergency Paid Sick Leave Act sunsets December 31, 2020.

III. Tax Credits for Paid Sick and Paid Family and Medical Leave

- The Act provides for refundable tax credits for employers required to provide paid sick leave and paid FMLA leave under this Act at an amount equal to 100% of the qualified sick leave and 100% of the qualified family leave wages.

Information contained in this memorandum is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.