

FMLA & Emergency Family and Medical Leave Expansion Act

Congress has now enacted the “Families First Coronavirus Response Act” (the “Act”).

The FFCRA contains two separate laws that impose paid family and sick leave obligations on employers with *fewer* than 500 employees. The purpose of this article is to address the expanded FMLA leave entitlement portion of the legislation which will take effect on Thursday, April 2, 2020.

The FFCRA applies to small employers with fewer than 50 employees, i.e., employers who are not presently covered by the provisions of the federal Family and Medical Leave Act (“FMLA”), subject to possible exemptions discussed below.

The paid family leave and sick leave provisions in the FFCRA are limited to effects directly related to the coronavirus and are subject to a sunset provision: those provisions will expire on December 31, 2020.

Paid Medical Leave – Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (“EFMLEA”) requires employers with fewer than 500 employees to provide employees with up to 12 weeks of leave for a “qualifying need related to a public health emergency,” which means COVID-19. In particular, a qualifying need means that an employee is unable to work (or telework) because the employee needs leave to care for a son or daughter under the age of 18 whose school or place of care has closed, or whose childcare provider is unavailable, because of an emergency with respect to COVID-19 declared by a federal, state or local authority.

Under the EFMLEA, the first 10 days of the employee’s leave may consist of unpaid leave, but an employee may choose to substitute any accrued paid leave (vacation, personal or medical or sick leave) for such unpaid leave. Following that 10-day period, an employer must provide *paid* leave to the employee for each additional day of leave. The rate of pay for such paid leave is calculated based on a rate of not less than two-thirds of the employee’s regular rate of pay and the number of hours the employee would otherwise normally be scheduled to work but is capped for each employee at \$200 per day or \$10,000 in the aggregate.



The EFMLEA differs from the FMLA in other important respects. For example, FMLA leave is available only to an employee whose employer has at least 50 or more employees within a 75-mile radius of the employee's worksite. The FMLA therefore does not apply to many small employers, but it covers all employers with 500 or more employees. The EFMLEA, in contrast, applies to *any* employer with fewer than 500 employees, and the EFMLEA has no mileage radius. The EFMLEA therefore governs smaller employers with fewer than 50 employees unless the Department of Labor decides to exempt such an employer on the grounds that imposition of the EFMLEA's requirements would jeopardize the employer's ability to continue operating.

The EFMLEA also broadens the scope of employees who are eligible for leave. Under the FMLA, employees are not eligible for leave unless they have worked for their employer for at least 12 months and have worked 1,250 or more hours in the 12-month period preceding their leave. The EFMLEA, in contrast, shortens the minimum period of employment from 12 months to just 30 days, and it includes no required number of hours worked during that period either.

If the employer has fewer than 25 employees and the public health emergency causes the employer to eliminate the position or restructure operating conditions, the employee is not guaranteed to be restored to the position if the employee takes leave pursuant to this portion of the FFCRA.

The Act allows the Secretary of Labor to issue regulations excluding certain health care providers and emergency responders from expanded FMLA leave, and to exempt small businesses with less than 50 employees if expanded FMLA leave would jeopardize the viability of the business as a going concern.

Note: This analysis is provided based on information currently available. As this health crisis is rapidly evolving, the guidance for response is subject to continual update.

