

## **GUIDANCE ON PAID LEAVE AND THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

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

The paid sick leave and expanded FMLA leave entitlements will take effect on Thursday, April 2, 2020.

### **PAID SICK LEAVE (THE EMERGENCY PAID SICK LEAVE ACT)**

Paid sick leave will be available to employees of employers having less than 500 employees and employees of government employers. Larger private employers are excluded. The U.S. Department of Labor (DOL) will have the option of exempting employees of any company having less than 50 employees, if it determines that providing paid leave “would jeopardize the viability of the business as a going concern.”

Paid sick leave must be provide to employees if they are unable to work (or telework) 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 an order as described in subparagraph (1) or has been advised as described in paragraph (2);

(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 childcare provider of such son or daughter is unavailable, due to COVID-19 precautions; or

(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.

There is an exemption for employers of employees who are health care providers or emergency responders.

Full-time employees will be eligible for paid sick leave for up to 80 hours. Part-time employees will be eligible for paid sick leave for the average number of hours that they work, or are expected to work, over a 2-week period. Employers cannot require employees to use other types of employer-provided paid leave before using the new federal paid sick leave in relation to the COVID-19 virus.



There is no length of service requirement for paid sick time. Paid sick time is available for immediate use by any employee, regardless of how long the employee has been employed.

For leave taken for the first three qualifying-reasons, paid sick leave would be at the employee's regular rate of pay. The amount of paid leave for these three reasons is capped at \$511/day and a total of \$5,110.

For leave taken for the fourth, fifth, and sixth reasons, paid sick leave would be at least two-thirds of the employee's regular rate of pay. The amount of paid leave for these other three reasons is capped at \$200/day and a total of \$2,000.

Special rules will apply to part-time employees working fluctuating workweeks.

Employers cannot require employees taking paid sick leave to try to find a replacement employee to cover their hours missed.

The entitlement to paid sick leave will expire on December 31, 2020, and any unused paid leave cannot be carried over into 2021. Congress could choose to extend this. Paid sick leave also ends when an employee's employment ends.

Employers will be required to provide employees with notice about the availability of paid leave. There will be a notice created by the DOL that needs to be posted in conspicuous places on the employer's premises. Employers will probably be also be allowed to provide employees electronic notice. The DOL is supposed to create the model notice within the next seven (7) days.

Employers can require employees who take paid sick leave related to COVID-19 to follow reasonable notice procedures in order to continue receiving such paid sick time. This would presumably involve the employee providing the employer with updates on his/her health status to continue receiving paid sick leave.

**EXPANDED FMLA LEAVE (THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT)** Formerly, FMLA leave was available only to those eligible employees who work for an employer with 50 or more employees within a 75-mile radius. That requirement is being suspended for COVID-19-related medical issues. The new FMLA provisions apply to all employers having less than 500 employees. As a result, many employers that were



not previously covered by the FMLA now may be required to provide job-protected and paid leave to employees for a COVID-19 -related reason.

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.

In the initial House bill, expanded FMLA leave was to be available for a number of reasons related to COVID-19, including the employee's own health-related issues. However, as finally enacted into law, expanded FMLA leave will only be for employees needing time off because the employee is unable to work (or telework) due to a need to care for the employee's son or daughter under age 18 if the child's school or place of care has been closed, or the child care provider is unavailable, due to a COVID-19-related public health emergency.

After an initial 10 days of unpaid leave, an eligible employee can receive paid FMLA leave to care for children younger than 18 whose school or child-care facility is closed because of the virus or whose child-care provider is unavailable because of the virus. During the initial 10-day period, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave. Thereafter, the employee can take this form of paid FMLA leave for up to the remainder of up to 12 workweeks generally available for other forms of FMLA leave.

The amount of paid FMLA leave is at least two-thirds of the employee's regular rate of pay for the hours the employee normally would have been scheduled to work. The maximum amount of paid FMLA leave is up to \$200/day and \$10,000 total.

Special rules will apply to part-time employees whose schedule varies from week to week.

Employees will need to provide notice to their employer to take leave. When the need for leave is foreseeable, the employee should provide the employer with such notice of the need for leave as is practicable. For unforeseeable leave, no prior notice is required.

This form of expanded FMLA will expire on December 31, 2020. Of course, it is possible that Congress will later extend this.



**Tax Credits**

Employers may recover some of the cost of the paid sick leave (under the Emergency Paid Sick Leave Act) via a tax credit applied to the employer's portion of FICA equal to the cost of qualified sick leave wages in a calendar quarter, but capped for each employee at \$511/day for leave taken for an employee's own medical care, and capped at \$200/day for leave taken to care for a family member. The credit is available for qualified sick leave wages paid during the period that begins on a date selected by the Secretary of the Treasury and ends December 31, 2020.

Employers may recover some of the cost of the paid family leave (under the Emergency Family and Medical Leave Expansion Act) via a tax credit applied to the employer's portion of FICA equal to the cost of qualified family leave wages. The tax credit for paid family leave taken under the expanded FMLA provisions is likewise capped per employee at \$200/day and \$10,000 in the aggregate. The credit is available for qualified family leave wages paid during the period that begins on a date selected by the Treasury Secretary and ends December 31, 2020.

