

COVID-19 & HR Law: Overview of Families First Coronavirus Response Act

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OVERVIEW OF THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- President Trump signed into law on 3/18/20
- The DOL has issued guidance, some of which clarifies certain gray areas. The DOL issued the temporary Rule on 4/1/20
- Leave provisions went into effect 4/1/20
- Leave provisions are temporary, and will sunset on 12/31/20
- Two types of leave for coronavirus-related reasons:
 - Emergency Paid Sick Leave Act
 - Emergency Family and Medical Expansion Leave Act
- Reimbursement to employers via tax credits
- The DOL estimates that 6 million employers are covered and a total of 60.5 million employees may be eligible if they otherwise qualify. DOL estimates that the total cost for employers to comply from 4/1 to 12/31 will be \$553 million.

EMERGENCY PAID SICK LEAVE ACT

Covered Employers/Qualifying Employees

- Private employers with 1-499 employees and public employers
 - Use FMLA's "integrated employer test"
- Any employee who works for a covered employer is eligible
- Only available where the employee is unable to work or telework
- Qualifying reasons:
 - (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 or self-quarantine as described above
 - (5) The employee is caring for a son or daughter if school or child care is closed/unavailable
 - (6) The employee is experiencing "any other substantially similar condition" specified by HHS (catch all)

EMERGENCY PAID SICK LEAVE ACT

Employee Wages

- Qualifying employees are entitled to:
 - Full-time employees – 80 hours of paid sick leave
 - Part-time employees – Pay is based on the employee's average number of work hours in a 2-week period. So, calculate hours of leave based on the number of hours the employee is normally scheduled to work
 - If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours.
 - Or, if employed for less than 6 months, the average number of hours/week the employee would normally be scheduled
- Leave is paid at employee's regular rate for qualifying reasons (1), (2) or (3)
 - Capped at \$511 per day and \$5,110 in the aggregate per person for qualifying reasons (1), (2) and (3)
- Leave is paid at 2/3 the employee's regular rate for qualifying reasons (4), (5) or (6)
 - Capped at \$200 per day and \$2,000 in the aggregate per person for qualifying reasons (4), (5) and (6)

EMERGENCY PAID SICK LEAVE ACT

Additional Rules

- Sick leave does not carry over
- Employer may not require employee as a condition of paid leave to find a replacement to cover scheduled hours
- Employer may not require employee to use other paid leave provided by the employer before using this paid sick leave
- Employer may permit employees to supplement paid leave with accrued PTO and/or use leave intermittently
- According to the most recent DOL guidance, if an employee takes paid sick leave, the employee must provide to the employer supporting documentation as specified in applicable IRS forms, instructions, and information for purposes of the refundable tax credit

EMERGENCY PAID SICK LEAVE ACT

Exemptions

- Exemptions
 - An employer of an employee who is a “healthcare provider” or an “emergency responder” may elect to exclude such employee
 - The DOL has broadly defined both terms
- Secretary of Labor has the authority for good cause to issue regulations:
 - To exclude certain health care providers and emergency responders from the definition of “eligible employee”
 - To exempt small businesses with fewer than 50 employees from leave to care for a son or daughter if school or child care is closed/unavailable when the imposition of such requirement would jeopardize the viability of the business as a going concern
 - “As necessary” (catch-all)

EMERGENCY PAID SICK LEAVE ACT

Notice Requirements

- Employers: Employers must post a notice regarding the requirements of the law
 - The Secretary of Labor has created a model notice
- Employees: After the first workday (or portion thereof) an employee receives paid sick leave, the employer may “require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time”

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Covered Employers/Qualifying Employees

- Private employers with 1-499 employees and all public employers
 - Use FMLA's "integrated employer test"
- Any employee who worked for employer for 30 of the prior 60 calendar days before the request for leave is made and who has a qualifying reason is eligible
 - Note: there is no requirement of 12 months/1250 hours, like with the regular FMLA
- Only available where the employee is unable to work or telework
- Only one qualifying reason:
 - "The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency"
 - "Public health emergency" is an emergency with respect to COVID-19 declared by a Federal, State or local authority
 - FMLA definition of "son or daughter" applies

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

How does it work?

- First 10 days may be unpaid
- An employee may elect to substitute accrued PTO, vacation, or sick leave to cover any portion of first 10 days
- Employer cannot require an employee to substitute such leave
- Eligible employees may take paid sick leave (if applicable) for the first 10 days of the Emergency Family and Medical leave period
- After the first 10 days:
 - Compensated at 2/3 of the regular rate
 - Pay is capped at \$200 per day and \$10,000 in aggregate per employee
- The benefit amount for part-time employees/irregular schedule pay is calculated the same as the Emergency Paid Sick Leave Act
- Generally the same exemptions as the Emergency Paid Sick Leave Act

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Job Restoration/Reinstatement

- If 25 or more employees, traditional restoration obligation – employees must be restored to the same or “equivalent” job
- If fewer than 25 employees, the traditional job reinstatement provisions of the FMLA do not apply IF:
 - The employee takes Emergency Family and Medical leave
 - The position does not exist due to economic conditions or other changes in operating conditions of the employer (i) that affect employment; and (ii) are caused by a public health emergency during the period of leave
 - The employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent pay, benefits, and other terms
 - If reasonable efforts to restore to an equivalent position fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the 1 year period

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Notice Requirements

- Employers: Employers must post a notice regarding the requirements of the law (or email/mail it to employees)
 - This is the same poster discussed earlier with the Paid Sick Leave Act. Employers must also post the regular poster required by the FMLA
- Employees: Where the necessity for leave is foreseeable, an employee shall provide the employer with notice of leave “as is practicable”

TAX CREDITS

Overview

- Employers subject to the requirements are entitled to a tax credit equal to the amount of the paid leave benefits paid by the employer, subject to the caps previously discussed
- The tax credits are applied against employer Social Security taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe
- IRS Guidance provides that employers will be able to retain an amount of payroll taxes equal to the amount of paid leave, rather than deposit them with the IRS in anticipation of the tax credit
- Example:
 - If an eligible employer paid \$5,000 pursuant to the Paid Sick Leave Act and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees, the employer could use up to \$5,000 of the \$8,000 of taxes that it was going to for reimbursement purposes, and the employer would only be required to deposit the remaining \$3,000 on its next regular deposit date

SCENARIO 1

- Sally has been employed full-time for 20 days at a call center that employs 40 people; she is not eligible to receive any paid time off under her employer's policies
- On April 2, 2020, Sally calls in sick with a sore throat and a fever of 100.7; she is waiting to be seen by her doctor
- What benefits, if any, would Sally be entitled to?
 - Emergency Paid Sick Leave Act: Sally is entitled to 80 hours at her regular rate, up to \$511 per day and \$5110 in the aggregate.
 - Emergency Family and Medical Leave Expansion Act: Sally does not qualify because she was not employed for at least 30 days prior to the first day of her leave

SCENARIO 2

- Sally has been employed full-time for 45 days at a call center that employs 40 people; she has accrued three (3) days of Paid Time Off under the employer's policies
- Sally's fourth-grade daughter's school is closed through the end of April, and Sally will be unable to work her full schedule from home during this time
- What benefits, if any, would Sally be entitled to?
 - Emergency Paid Sick Leave Act: 80 hours at 2/3 her regular rate of pay, subject to a daily cap of \$200 and an aggregate cap of \$2,000
 - Emergency Family and Medical Leave Expansion Act: up to 12 weeks of job protected leave at 2/3 her regular rate of pay, subject to a daily cap of \$200 and an aggregate cap of \$10,000
 - Reminder, the first 10 days are unpaid, but could be paid at 2/3 her regular rate of pay under the Emergency Sick Leave Act, subject to the caps
 - After the first 10 days, Sally will be paid at 2/3 her regular rate of pay, subject to the caps
 - Sally may elect to use her 3 days of PTO during the first 10 days, but she can not be required to
 - The employer may allow Sally to supplement her paid leave benefit with accrued PTO and/or allow Sally to take leave intermittently

CARES Act

- Small Business “Paycheck Protection” Loans
 - Includes small business loans up to \$10 million to help with normal payroll and other costs
 - Does not include costs to provide EPSL or EFMLA paid leave
 - Loans will be forgiven
 - But amount of forgiveness will be reduced if you lay off workers or reduce compensation more than 25%.
 - Reduction will be completely avoided if the employer (by 6/20/20), rehires employees that were laid off on or after 2/15/20
- Employee Retention Tax Credit
 - Not available if you get the “paycheck protection” loan
 - Tax credit on payroll tax credit for 50% of wages (for first \$10,000 of compensation) for employers whose (1) operations were fully or partially suspended due to COVID-19, or (2) gross receipts declined by more than 50%.
- Payroll Tax “Holiday”
 - Employers may defer their portion of Social Security taxes over 2 years – ½ due by 12/31/21, and ½ due 12/31/22.

CARES Act

- Unemployment Insurance
 - Significant infusion of funding
 - Provides workers with \$600/week from feds (in addition to state UI) for four months
 - Also extends benefits to independent contractors and “gig workers”
- Mid-Size Business Loans
 - To be administered by Treasury
 - For employers with between 500-10,000 employees
 - Business must make a good-faith certification that it will “remain neutral in any union organizing effort for the term of the loan.”
- Any Changes to FFCRA New Leaves?
 - For purposes of EFMLA, an employee who was laid off on or after 3/1/20, had worked for 30 of the last 60 calendar days before layoff, and is rehired, will be eligible for EFMLA (don’t have to restart the 30 days).

Questions? You can email the presenters:

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