

Home > Insights > Publications > Coronavirus legislation may impact your paid leave and FMLA obligations



Coronavirus legislation may impact your paid leave and FMLA obligations

 Chuck Poplstein  Colin Pajda  March 18, 2020



The Families First Coronavirus Response Act [we first reported](#) on earlier this week has now passed the Senate after technical corrections by the House of Representatives, and has been sent to the President for signature.

The Senate is working on its own relief package as well in addition to this.

This bill creates several significant paid leave requirements for employers. Even employers not usually covered by the Family and Medical Leave Act (FMLA) may be required to offer FMLA leave and paid sick time for employees who must miss work for coronavirus-related reasons.

Coverage

The new law will take effect no later than 15 days after enactment. The Bill contains a sunset provision of December 31, 2020.

The new law does not apply to employers with 500 or more employees. Regulations from the Secretary of Labor expected to be circulated within seven days of the Act's enactment should clarify the basis for calculating the number of employees.

Employers with one or more but fewer than 500 employees are subject to the act. However, employers with fewer than 50 employees may apply for an exemption from the new requirements if they can establish that compliance with the Act would jeopardize the viability of their business.

Emergency Family and Medical Leave Expansion Act

The Bill expands the FMLA to include a new type of approved leave: public health emergency leave related to the COVID-19 pandemic. This leave is available to employees who must take leave to care for their minor children because the school or place of care for the children has been closed due to the COVID-19 public health emergency.

Unlike the FMLA coverage requirements for other types of leave (employers with 50 or more employees within a 75 mile radius), all employers with fewer than 500 employees must grant public health emergency leave to anyone who has been employed for at least 30 days. The usual FMLA requirements that an employee have been employed for at least 12 months and have worked 1,250 hours do not apply to public health emergency leave.

The structure of public health emergency leave is also significantly different than standard FMLA leave. While standard FMLA leave is unpaid, public health emergency leave is only unpaid for the first 10 days. During this first 10 days, an employee may choose to substitute paid time off they have accrued under the employer's policy, but the employer may not require the employee to use their paid leave. After that, the employer must provide paid leave for each day of leave taken under the Act. This paid leave is calculated at two-thirds the employee's regular rate of pay for the number of hours the employee would normally be scheduled to work, **but is capped at \$200 per day or \$10,000 in the aggregate**. For perspective, the per-day cap would usually kick in for employees making more than \$78,000 per year.

The Act also creates certain exemptions and exceptions for small employers that would not normally be covered by the FMLA and allows health care providers and emergency responders to exclude those employees from leave under the Act.

Among all of these departures from the standard FMLA, the bill does retain some familiar features: employees must give as much notice as practicable if leave is foreseeable, employees must be restored to the positions they held at the commencement of their leave (with a possible exemption for small employers (25 or less employees) in certain circumstances), and the leave allotment is still 12 weeks' leave in a 12-month period. This means that public emergency health leave should not be available once the employee has used up their 12 weeks of FMLA leave for any and all reasons within the measurement period.

The new leave requirements will begin within 15 days of the Act's enactment and will run through December 31, 2020.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (EPSLA) requires employers to provide all employees with 80 hours of paid sick leave for certain qualifying coronavirus-related reasons. The Act only applies to an employer who has fewer than 500 employees.

Under the EPSLA, full-time employees are entitled to 80 hours of paid sick time for certain coronavirus-related reasons. Part-time employees are entitled to a number of hours equal to the average number of hours they would normally work in a two-week period. The benefit is available to any employee no matter how long they have been employed. Note that the calculations are based on an employee's "regular rate" as defined by the FLSA, which may be greater than an employee's base hourly rate if they also are paid certain types of additional compensation.

Employees may take paid sick time 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 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 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.

If the employee is taking leave for their own care (reasons 1, 2, and 3 above), then the paid sick time is compensated at the employee's regular rate (but not less than the applicable federal, state, or local minimum wage) capped at \$511 per day (which would apply to someone making more than \$130,000 per year) or \$5,110 in the aggregate. If the employee is taking leave to care for someone else or for a related condition specified by the Secretary of Health and Human Services (reasons 4, 5, and 6 above), then the paid sick time is compensated at two-thirds their regular rate capped at \$200 per day or \$2,000 in the aggregate. Regular rate is determined using the FLSA definition.

There are several other technical aspects of emergency paid sick time employers will want to keep in mind as the Act becomes effective, as these can differ significantly from state paid sick leave requirements and from existing employer policies:

- Unlike paid sick leave required by some state laws or employer policies, paid sick time under the Act does not carry over from one year to the next.
- Unused paid sick time under the Act does not need to be paid out on an employee's termination, resignation, retirement, or separation from the employer.
- The employer may not require the employee to search for or find a replacement in order to receive paid sick time under the Act.
- Paid sick time is available for immediate use regardless of how long the employee has been employed.
- The employee may use paid sick time under the Act before using any other accrued paid time off.
- Emergency paid sick time is in addition to any paid time entitlement under the employer's existing paid time off policy. The employer may not change its paid leave policies on or after the date of the Act's enactment to avoid providing the additional two weeks of emergency paid sick time. **Employers who are voluntarily providing paid sick benefits related to the COVID-19 public health emergency should contact employment counsel before changing any currently-running policies.**

Violations of the EPSLA carry the same basic remedies as a violation of the FLSA. Like the FLSA, the EPSLA prohibits discrimination or retaliation against employees who take paid sick time or file a complaint related to the Act.

Each employer must post and keep posted in a conspicuous place a notice advising employees of their rights to emergency paid sick time. The Secretary of Labor will make a model notice publicly available within 7 days after the enactment of the Act.

Like the EFMLEA, the EPSLA allows employers of health care providers and emergency responders to exclude those employees from leave under the Act. It is unclear who specifically would be classified as a health care provider or an emergency responder.

The new paid sick time requirements will begin within 15 days of the Act's enactment and will run through December 31, 2020.

Tax Credits for Paid Sick and Paid Family and Medical Leave

To help employers cover the costs of the new Paid Family and Medical Leave and Paid Sick Time requirements, the legislation includes certain tax credit provisions equal to 100% of the qualifying wages paid under the two programs, subject to certain caps and limitations. The credit is taken against payroll taxes owed. Also, paid sick leave or paid public health emergency leave will not be considered wages for employment tax purposes. The Secretary of the Treasury will be releasing regulations and guidance to help employers navigate these tax credit provisions.

Thus far the Act is not retroactive, which means that any paid time currently being granted would not count toward FMLA leave or toward the 80 hours of sick leave, nor be eligible for the credit.

This is only a summary of the most significant changes that will be affecting employers over the next few weeks. We will continue to post updates and guidance as more information is released.

We are available to answer more specific questions on exactly how these new laws will affect your company. Please contact any of our attorneys listed here with questions.

[Chuck Poplstein](#) and [Colin Pajda](#) are attorneys in Thompson Coburn's Labor & Employment practice group.

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