



What does the Families First Coronavirus Response Act Mean for Employers?

President Trump signed the Families First Coronavirus Response Act (the “Act”) on Wednesday, March 18, 2020. This sweeping legislation addresses a plethora of concerns raised by the recent COVID-19 outbreak. It becomes effective 15 days after the President signs it, or on April 2, 2020. The employment-related sections will require employers to provide certain paid and unpaid leave days to employees impacted by the current public health situation.

The Act instructs the Secretary of Labor to issue regulations implementing the employment-law related provisions. We expect the regulations to clarify, and potentially modify, the provisions of the Act.

The following Q&As provide general guidance regarding the key provisions of this law, based on the information to hand. Situations can vary depending on many factors, which would determine how this law might apply to your organization.

Q: What do employers need to know about this new law?

A: The Act contains two key provisions for employers:

1. *The Emergency Family and Medical Leave Expansion Act* (“EFMLEA”), which amends the federal Family and Medical Leave Act (“FMLA”), requires employers with less than 500 employees to provide up to 12 weeks of partially paid, potentially job-protected leave in a 12-month period, in certain COVID-19 related circumstances, called “Public Health Emergency Leave.”
2. *The Emergency Paid Sick Leave Act* requires employers with less than 500 employees to provide employees with up to 80 hours of emergency paid sick leave (“EPS Leave”) over and above whatever paid time off benefits are already offered to their employees under company policies and/or local sick leave laws, for a number of COVID-19 related reasons.

Small employers may be able to claim an exemption from some requirements of the laws, as described below.

Questions Regarding Public Health Emergency Leave:

Q: For what reasons can Public Health Emergency (“PHE”) leave be taken?

A: The 12 weeks of PHE leave may be taken if an employee is unable to work (or telework) due to a need to care for the employee's son or daughter under 18 years of age if:

1. the child's school or place of care has been closed, or
2. the child's child care provider is unavailable, due to a public health emergency.

Q: What determines employee eligibility for PHE leave?

A: Employees become eligible for the 12 weeks of PHE leave after having been employed for 30 days.

Q: Is the PHE leave paid or unpaid?

A: The first 10 days of a potential 12 weeks of PHE leave are unpaid, however the employee can use EPS leave benefits during these 10 days. An employee can choose to substitute other available paid time off benefits provided by the company as well. After those initial 10 days, the remaining 10 weeks of PHE leave are paid at a rate of 2/3 the employee's regular rate of pay, up to \$200.00 per day or \$10,000.00 total for the 10 weeks. Special calculations exist for employees whose schedule varies. There is a payroll tax credit available.

Q: Why is this considered "job protected" leave?

A: The usual FMLA requirements that the employee be returned to their same or to an equivalent position with equivalent pay and benefits applies to employees returning from PHE leave (with the same exceptions, such as for positions eliminated while the employee was on leave). However, employers with less than 25 employees will be excused from complying with the job restoration provisions if the employer makes reasonable efforts to return the employee after leave which are not successful, and the employer contacts such employee if an equivalent position becomes available within a year.

Questions Regarding Emergency Paid Sick Leave:

Q: For what reasons can Emergency Paid Sick ("EPS") leave be taken?

A: The up-to-10 days (80 hours) of EPS leave may be taken if:

1. The employee is subject to a quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine;
2. The employee is caring for an individual (any individual) subject to a quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to self-quarantine;

3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for a son or daughter if the child's school or place of care has been closed, or the child's child care provider is unavailable, due to COVID-19 precautions. This provision is the only one that overlaps with the reasons PHE leave can be used.

Q: What determines employee eligibility for EPS leave?

A: EPS leave applies to all employees, without regard to how long they have been employed.

Q: How much EPS leave must be provided?

A: Full-time employees must be provided with 80 hours of EPS leave. Part-time employees are provided with as many hours as the employee would be expected to work in a two-week period. This time is available for use as soon as the Act becomes effective and need not be accrued.

Q: If the company already offers paid sick time or PTO that exceeds the 80 hours of sick time provided by this law, does the company have to offer additional paid sick time under this law?

A: Yes. Additionally, employers may not require an employee to exhaust other forms of PTO or sick leave before the EPS leave can be taken.

Q: How much pay may an employee receive while on EPS leave?

A: If the employee is out for reasons related to his or her own health, the rate of pay per day is calculated at the employee's regular rate, which must be no less than the applicable minimum wage. However, if the employee is taking sick leave to care for an individual with a qualifying condition or because their child's school or daycare is closed, the employer is only required to pay 2/3 of that amount. Employees are entitled to receive up to a maximum of \$511.00 per day (i.e. \$5,110.00 if 10 days are used) when taking sick time for reasons related to their own health. Employees are entitled to receive a maximum of \$200.00 per day (i.e. \$2,000.00 if 10 days are used) when taking leave to care for a qualifying individual or because of their child's school/day care closure. There is a payroll tax credit available.

Q: If an employee does not use EPS leave and their employment is terminated while the Act is effective, is the employee entitled to be paid out unused emergency sick leave?

A: No.

General Questions:

Q: How long must these benefits be provided?

A: Both laws are currently set to sunset on December 31, 2020, but Congress can always extend them.

Q: I'm a small employer - these laws will kill my business. Can I get a break?

A: The legislation permits the Secretary of Labor to issue regulations that, among other things, exempt small businesses with fewer than 50 employees from the requirements of providing any PHE leave and of providing EPS leave due to lacking child care, when the imposition of such requirements "would jeopardize the viability of the business as a going concern." Also, employers with less than 50 employees will not be subject to civil lawsuits by employees if they do not provide PHE leave, although they may still be subject to claims filed through the Department of Labor. DOL regulations should be issued in a few weeks.

Q: Does the law apply retroactively to require pay for leaves taken before April 2, 2020?

A: Probably not. Most laws are only effective prospectively (looking forward), and this one is not likely to be applied differently.

This is only a brief overview of the employment-law related provisions of this very lengthy law. As noted, the Department of Labor is expected to issue regulations detailing how the law is to be implemented.