

## **The Families First Coronavirus Response Act**

**Earlier this week the US Congress passed the Families First Coronavirus Response Act and the President signed it into law. The law becomes effective on April 2, 2020, and requires employers of fewer than 500 employees to provide both Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave to assist employees impacted by COVID-19. In addition, the law provides for federal grants for unemployment benefits and tax credits for employers who provide the Emergency Paid Sick or Emergency Paid Family Medical Leave benefits in compliance with the law. The Secretary of Labor will provide guidelines by April 2.**

**These new emergency benefits will expire on December 31, 2020.**

**Emergency Paid Sick Leave:** In general, paid sick leave is required when an employee is unable to work or telework for certain reasons related to COVID-19.

**Covered Employer:** This law applies to private employers with fewer than 500 employees, and covered public employers.

**Covered Employees:** All employees.

**Not Covered Employees:** An employer may exclude employees who are health care providers or emergency responders from this coverage. The law also grants the Secretary of Labor the authority to issue regulations to: (a) exclude certain health care providers and emergency responders from the definition of employee by, among other things, allowing them to opt out; (b) exempt small businesses with fewer than 50 employees from these requirements if they jeopardize the viability of a business as a going concern; and (c) ensure consistency between the paid family and paid sick standards and tax credits.

**Reason for Paid Sick Leave Benefit:** The Covered Employer must provide paid sick time to an employee who is 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 because of COVID-19;
- (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- (4) the employee is caring for an individual subject or advised to quarantine or isolation;
- (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
- (6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

## **Amount of Paid Sick Leave Benefit/Limits on the Dollar Amount for Paid Sick Leave Benefit:**

(1) Full Time Employees: Full-time employees are entitled to 80 hours of paid sick time; and

(2) Part-Time Employees: Part-time employees are entitled to less and is calculated based upon the number of hours worked, on average, in a two week period. This can be calculated based on the six month period immediately prior to the date that the leave begins. This calculation must include hours for which the employee took “leave of any type.”

## **Dollar Amount:**

**For Reasons Related to the Employee’s Health Condition** (outlined as 1, 2, and 3 above): The rate is the greater of the employee’s regular rate, or the applicable federal, state, or local minimum wage. However, the Paid Sick Leave dollar amount is capped at no more than \$511 per day and \$5,110 in the aggregate. (\$63.87 per hour for an 8 hour day.)

**For Reasons Related to the Employee’s Need to Care for Another** (outlined as 4, 5, and 6 above): The rate shall be two-thirds the employee’s regular rate, or the applicable minimum wage. Further, this amount is also capped at \$200 per day and \$2,000 in the aggregate. (\$25 per hour for an 8 hour day.)

**Notice is required and the federal government will be providing an example notice prior to April 2.**

**Employee Notice:** After the first workday an employee receives Paid Sick Time under this benefit, an employer may require the employee to follow reasonable notice procedures in order to continue receiving this benefit.

**Employer Tracking:** Employers should carefully track this Emergency Paid Sick Leave to properly prove compliance and to show that the Employer is eligible for the related tax relief.

**RISKS:** Employers are prohibited from retaliating against any employee who takes leave in accordance with the new law. The law further provides that the failure to pay required sick leave will be treated as a **failure to pay minimum wages in violation of the Fair Labor Standards Act**. A failure to pay minimum wage under FLSA results in damages for lost wages, liquidated damages (double damages), and attorney fees.

**Emergency Paid Family and Medical Leave Act:** In general, the federal FMLA is temporarily amended to provide additional leave and protection to employees who must take time off of work to care for a minor child if the child’s school or place of care has been closed due to COVID-19.

**Covered Employers:** This law applies to private-sector employers with fewer than 500 employees and covered public-sector employers.

**Covered Employees:** To be eligible, employees must have been on the payroll for 30 calendar days. (This is an important exception to FMLA to address the immediate need for this benefit.)

**Not Covered Employees:** An employer may exclude employees who are health care providers or emergency responders from this coverage. The law also grants the Secretary of Labor the authority to issue regulations to: (a) exclude certain health care providers and emergency responders from the

definition of employee by, among other things, allowing them to opt out; (b) exempt small businesses with fewer than 50 employees from these requirements if they jeopardize the viability of a business as a going concern; and (c) ensure consistency between the paid family and paid sick standards and tax credits.

**Amount of Benefit:** Employers must provide up to 12 weeks of job-protected FMLA leave for “a qualifying need related to a public health emergency” to employees who have been on the payroll for 30 calendar days. This “qualifying need” is limited to circumstances where an employee is unable to work or telework due to a need to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency, COVID-19.

**First 10 Days:** The first 10 days are unpaid. An employee can choose to substitute accrued vacation, personal, or sick leave, but an employer may not require an employee to do so.

**Dollar Amount:** The remainder of Emergency Paid FMLA leave is required to be paid, generally at two-thirds of the employee’s regular rate, for the number of hours the employee would otherwise be scheduled to work. The dollar amount of the benefit is capped at no more than \$200 per day and \$10,000 in the aggregate. (\$25 per hour for an 8 hour day up to the aggregate.)

**Reinstatement:** The employer must restore employees to their prior positions (or an equivalent) upon the expiration of their need for leave. There is an exception to this requirement for employers with fewer than 25 employees, if the employee’s position no longer exists following leave due to operational changes occasioned by a public health emergency (*for example*: a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions.

**Limits on Damages:** Due to the expansion of the FMLA protections for Emergency Paid FMLA, the law appears to exclude employers with fewer than 50 employees in a 75-mile radius from civil FMLA damages in an employee-initiated lawsuit.

### **Tax Credits and Other Efforts**

**Tax Credit:** For both the Emergency Paid Sick Time Act and the Emergency Paid Family Medical Leave Act, employers may claim a limited refundable employment tax credit equal to payments made to employees for both types of leave, subject to a maximum per employee limits related, in general, to the maximum benefits permitted under each benefit. The amount of credit is increased by the amount of nontaxable health insurance premiums paid by the employer for employees who are out on either leave, for the days of leave, and further increased by the amount of Medicare tax owed by the employer with respect to the leave payments. The employer’s total available credit amount is also added to its income for the year. Unlike the credit for Paid Sick Time, however, there is already a general business credit available to certain employers who provide paid FMLA leave, and the new Emergency Paid FMLA credit is not allowed with respect to any wages for which the general business credit is allowed.