

On March 18, 2020, Congress passed, and the President signed, a *revised* version of The Families First Coronavirus Response Act (the Act) that was first passed out of the House on March 14. The Act requires employers with fewer than 500 employees to provide COVID-19-related paid sick and family leave to eligible employees. Significant changes from the original House version that we reported on are noted by underline, below. The Act will take effect within 15 days (April 2, 2020).

Paid Sick Leave for COVID-19 reasons

The Act requires employers to provide all employees, regardless of their tenure with the company, with 10 days of paid sick leave if an employee is “unable to work (or telework)” due to one of the following COVID-19-related reasons:

1. The employee is subject to a governmental quarantine related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine for reasons related to COVID-19.
- 3) The employee is symptomatic and is seeking a medical diagnosis for possible COVID-19.
4. The employee is caring for an individual who (i) is subject to a governmental quarantine order related to COVID-19, or (ii) has been advised by a health care provider to self-quarantine for reasons related to COVID-19. (The original version limited leave to care for a “family member” but has been broadened to “an individual.” Paid sick leave is not required to care for a symptomatic family member unless they are subject to a governmental quarantine order or medical recommendation of self-quarantine).
5. The employee is caring for their own son or daughter if their school or daycare has been closed, or the child care provider 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.

Full-time employees are entitled to 80 hours of COVID-19-related paid sick leave, and (ii) part-time employees are entitled to COVID-19-related paid sick leave in an amount equal to the number of hours that the employee works, on average, over a two-week period.

If paid sick leave is taken for the employee’s own need to quarantine, self-isolate, or seek diagnosis or care), the employee is entitled to compensation at their regular rate of pay capped at \$511 per day.

If paid sick leave is taken with respect to care for an individual subject to quarantine/self-isolation or a child whose school or daycare provider is closed, or if the employee is experiencing any other “substantially similar condition,” the employee is entitled to compensation at two-thirds of the employee’s regular rate of pay capped at \$200 per day.

Employers cannot require an employee (i) to use other paid leave provided by the employer before using the COVID-19-related paid sick leave provided for under the Act or (ii) to find another employee to cover the hours during which the employee is using COVID-19-related paid sick leave. Employees cannot carry over COVID-19-related paid sick leave and are not entitled to payment for any unused COVID-19-related paid sick leave upon termination of employment.

Employers will be required to post a notice informing employees of their right to COVID-19-related paid sick leave under the Act. The Act requires the Secretary of Labor to (i) make a model notice publicly available not later than 7 days after the date of enactment; and (ii) issue guidelines to assist employers in calculating the amount of paid sick leave not later than 15 days after the date of enactment.

Paid FMLA Leave to Care for a Child

The Act also requires employers to provide employees who have been working for at least 30 calendar days with up to 12 weeks of job-protected FMLA leave if an employee is “unable to work (or telework)” due to a need to care for a child under 18 years old if the child’s school or daycare has been closed, or the provider is unavailable, due to a public health emergency. This is the only reason authorized for paid FMLA leave under the Act.

This sole qualifying reason for COVID-19-related FMLA leave is a significant narrowing from the qualifying reasons included in the original House version of the Act, which used the same qualifying reasons as for COVID-19-related paid sick leave.

Subject to possible exemption as may be issued by the Secretary of Labor, COVID-19-related FMLA leave is required of employers with fewer than 50 employees and employees who work at a facility of any size will be eligible for COVID-19-related FMLA leave under the Act.

The first 10 days of leave are unpaid (although the employee may be entitled to COVID-19-related paid sick leave under the provision noted above), and employees are entitled to paid leave in an amount equal to two-thirds of the employee’s regular rate of pay for the remaining 10 weeks capped at \$200 per day.

Possible exceptions to COVID-19-related paid leave requirements:

- The Act authorizes the Secretary of Labor to issue regulations exempting businesses with fewer than 50 employees from the Act’s COVID-19-related paid leave requirements (both sick pay and paid FMLA leave) if the imposition of these requirements would jeopardize the viability of the business as a going concern.
- As to the job-protected component of the paid FMLA leave, the Act states that employers with fewer than 25 employees may not be required to return employees to their same or equivalent position upon their return to work if the employee’s position ceases to exist due to an economic downturn or as a result of other circumstances caused by a public health emergency. The employer must make reasonable attempts to return the employee to an equivalent position and must contact any displaced employee for up to a year after they are displaced if an equivalent position becomes available.
- There is no private right of action against businesses with fewer than 50 employees for a violation of the Act’s COVID-19-related FMLA leave requirements. The USDOL may bring a direct enforcement action for violations of the Act.