

The Families First Coronavirus Response Act

an economic stimulus plan aimed at addressing the impact of the COVID-19 outbreak on Americans and introducing paid sick leave and an expanded family and medical leave to the nation's employers.

Emergency Family and Medical Leave Expansion Act:

- 1. Expanded Coverage and Eligibility:**
 - a. The current employee threshold for FMLA coverage would change from only covering employers with 50 or more employees to instead covering those employers with **fewer than 500 employees**.
 - b. Lowers the eligibility requirement such that any employee who has worked for the employer for at least 30 days prior to the designated leave may be eligible to receive paid family and medical leave.
- 2. Reasons for Emergency Leave** – Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to **12 weeks of job-protected leave** to allow an employee, who is unable to work or, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency. This is now the **only** qualifying need for Emergency FMLA Paid Leave
- 3. The first 10 days of Emergency FMLA may be unpaid.** During this 10-day period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all the 10-day unpaid period. After the 10-day period, the employer generally must pay full-time employees **at two-thirds the employee's regular rate** for the number of hours the employee would otherwise be normally scheduled. The Act now limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.
- 4. Calculating Pay for Non-Full Time Employees** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA. Employees who have worked for less than six months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.
- 5. Job Restoration** – Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon the return to work. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.
- 6. Date of Expiration** – This program will remain in effect until December 31, 2020.

Emergency Paid Sick Leave Act:

This act allows an eligible employee to take paid sick leave because the employee is:

1. Subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns.
3. Experiencing COVID-19 symptoms and seeking medical diagnosis.
4. Caring for an individual subject to a federal, state, or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns.
5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. 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.

Of note, caring for another who is subject to an isolation order or advised to self-quarantine as described above is not limited to just family members.

- **Eligibility** – This provision requires employers with **fewer than 500 employees** to provide full-time employees (regardless of the employee's duration of employment prior to leave) with **80 hours of paid sick leave at the employee's regular rate** (or two-thirds the employee's regular rate to care for qualifying reasons 4, 5, or 6 listed above).
- **Cap on Paid Sick Leave Wages** – Paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others and any other substantially similar condition.
- **Carryover and Interaction with Other Paid Leave** – This paid sick leave will not carry over to the following year and may be in addition to any paid sick leave currently provided by employers.
- **Calculating Rate of Pay** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period.
- **Effective Date and Expiration** – This program remains in effect until December 31, 2020.

Tax Credits for Paid Sick and Paid Family and Medical Leave:

*This section provides a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above. These tax credits are allowed against the employer portion of Social Security taxes. While this limits application of the tax credit, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

- Employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.
- Employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

Additionally, as part of the CARES Act, all states were required to implement employer notification provisions to receive federal unemployment insurance funds. Effective April 16, the South Carolina Department of Employment & Workforce (SCDEW) has required employers to provide employees with a new notice about unemployment benefits upon separation of employment or a decrease in working hours. Employers must provide the notice to employees informing them that:

- Unemployment insurance (UI) benefits are available to workers who are unemployed and who meet the requirements of South Carolina's UI eligibility laws.
- Employees may file a UI claim if they are separated from employment or their work hours are reduced.
- Employees will need to provide DEW with their full legal name, Social Security Number, and authorization to work if the worker is not a US citizen or resident to process their claim; and

- Employees may visit the Department of Employment and Workforce's (DEW) website at dew.sc.gov or call DEW at 1-866-831-1724 for assistance or more information.

Recent Equal Employment Opportunity Commission (EEOC) Guidance on COVID-19 Issues

- The agency acknowledged that public health authorities have identified those age 65 and over as being at higher risk for a severe case of COVID-19 if they contract the virus
- The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against those 40 and older, the law prohibits employers from involuntarily excluding an individual from the workplace based on their being 65 or older – “even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.”
- Workers are not entitled to an ADA reasonable accommodation simply to avoid exposing a vulnerable family member to a potential case of COVID-19. **The federal disability rights statute does not require you to accommodate an employee without a disability based on any disability-related needs of a family member or anyone else.**
- Caregivers/ Family Responsibility: You are permitted to provide flexibilities to workers who are juggling work responsibilities and parenting during this time of school closures and distance learning (such as telework, modified schedules, or other benefits), but need to make sure you are not treating employees differently based on sex or other EEO-protected characteristics. “For example,” the EEOC says, “female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.”
- Pregnancy: Just as with older workers, you may not involuntarily exclude an employee from the workplace due to pregnancy. “Even if motivated by benevolent concern,” the EEOC says, “an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.”

South Carolina Department of Health and Environmental Control (DHEC) Issues New Guidance for Employers on COVID -19

On June 29, 2020, the South Carolina Department of Health and Environmental Control (DHEC) released new guidance to assist employers in addressing COVID-19 in the workplace. Employers are advised to review and implement the guidance into their current policies and procedures. Following DHEC guidance (along with OSHA and CDC guidance) is the best way employers can avoid liability concerns with respect to operating in a COVID-19 environment. The following is a summary of the key provisions.

1. **Employee Tests Positive:** If an employee tests positive for COVID-19, an employer should immediately tell the employee to stay at home and contact their healthcare provider. The employee who tested positive should stay at home until:
 - a. Ten days have passed since their symptoms began, AND
 - b. They are free of fever for three days without using fever-reducing medicines, AND
 - c. Their other symptoms have improved.

Upon notice of a positive case, HR should immediately gather the following information:

- d. Date of onset of symptoms (if applicable)

- e. Date and location where the test specimen (swab) was collected
- f. Date the test results were received
- g. Instructions provided by the healthcare provider when test results were communicated
- h. Whether the employee came in close contact with any other employees or visitors from 48 hours prior to the onset of symptoms (or specimen collection if they never had symptoms) until they were sent home.

2. Employee Sick and Not Yet Tested

- a. If an employee begins to experience symptoms associated with COVID-19, an employer should require the employee to remain at home. Similarly, the employer should encourage the employee to get tested for COVID-19.
- b. If the employee does not get tested, he or she should remain out of work under the same criteria (i.e. ten days, free of fever, symptoms improved) as if he or she tested positive. If the employee does get tested and it comes back negative, he or she should *still* remain at home until symptoms have resolved.

3. Employee in Close Contact of a Positive Case

- a. If an employee has been within six feet for more than fifteen minutes of someone who tested positive for COVID-19, an employer should require the employee to remain at home and self-quarantine. Specifically, if the employee lives with someone who tested positive, he or she must self-quarantine for a minimum of 17 days. If the employee was simply in close contact with someone who tested positive, then he or she must self-quarantine for 14 days after their last contact with the positive individual. An employee should not return to work before these quarantine periods end without contacting HR who, in turn, will consult with DHEC.

4. Employee in Close Contact of Someone Sick/Not Yet Tested

- a. If an employee either lives with or has been in close contact with someone who shows symptoms of COVID-19, an employer may allow the employee to stay at work until the ill person(s) have gotten test results. If the ill person tests positive, the employee must self-quarantine as specified in Section C.

5. Employee's Housemate in Close Contact with Someone Sick

- a. When an employee lives with someone who has been in close contact with another person who exhibits COVID-19 symptoms, an employer may allow the employee to remain at work so long as he or she does not start to show symptoms. However, if the employee's housemate begins to develop symptoms, the employer should require the employee to return home until his or her housemate gets tested. Then, if the housemate tests negative, the employee may return to work; and if the housemate tests positive, the employee should self-quarantine per Section C.

6. Employee eats at Restaurant where Staff tests Positive

- a. An employer need not require an employee to stay at home if he or she eats at a restaurant where a staff member tested positive. However, if the employee starts to display symptoms of COVID-19, *then* the employer should require the employee to stay at home.

If you have any further questions, please reach out to Paul Hilton at (803) 481- 9533 | paulhiltonhr@aol.com