

On March 18, 2020, the Senate passed and the President signed the [Families First Coronavirus Response Act](#) (the “Act”). Both the proposed FMLA changes and the proposed paid sick leave would take effect 15 days after enactment and would remain in place only until the end of 2020.

The Act applies to employers with 500 or fewer employees (“Covered Employers”). The Act will:

- Expand the federal Family and Medical Leave Act (FMLA) to provide up to 12 weeks of public health emergency leave for most employees who cannot work (or telework) because they need to care for their child who is under 18 years of age, if the child’s school or place of care has been closed or their child care provider is unavailable due to coronavirus; and
- Require employers to provide up to two weeks of paid sick leave because of the Coronavirus.

Temporary Expansion of the FMLA to Include Public Health Emergency Leave for Coronavirus-Related Absences

The Act expands the FMLA to require Covered Employers to provide all employees who have been employed **for at least 30 calendar days**. **The usual FMLA requirements that the employee has been employed for a year, worked for 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius would not apply.** Eligible employees will have the right to take FMLA leave for any of the following public health emergency-related reasons (Public Health Emergency Leave):

- **To care for the employee’s child because their school or place of care has been closed or their childcare provider is unavailable due to coronavirus.**

The first 10 days of Public Health Emergency Leave can be unpaid, though an employee may elect, but cannot be required, to have such leave paid by substituting any accrued vacation, paid time off (PTO) or paid sick leave.

After 10 days of leave have been taken, the employer must provide paid leave. Paid leave must be an amount that is not less than two-thirds an employee’s regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work; provided, however, that such paid leave is capped at \$200/day. Paid leave must

continue until the qualifying condition no longer exists, or after twelve weeks of leave have been taken. Finally, there is a \$10,000 cap on the aggregate amount of paid leave paid to an employee.

The Act also includes specific formulas for calculating pay for employees with varying weekly schedules.

Under the FMLA, an employee is typically guaranteed job-reinstatement to the same or an equivalent position at the end of their leave. Under the Act, however, the job restoration obligation does not extend to employers with fewer than 25 employees who take Public Health Emergency Leave so long as:

- The employee's position no longer exists due to economic conditions or other changes in operating conditions due to a public health emergency;
- The employer made a reasonable effort to restore the employee to an equivalent position at the conclusion of leave; and
- The employer makes a reasonable effort to contact the employee in the 1-year period after the applicable leave if the equivalent position becomes available.

The Act also gives the Department of Labor the authority to issue regulations exempting certain employers from the Public Health Emergency leave obligations, including small business with fewer than 50 employees, if the requirements will jeopardize the business' viability, as well as certain health care providers and emergency responders. Notably, however, the exemptions themselves are not part of the Act.

Paid Sick Leave

The Act requires Covered Employers to provide full-time employees with 80 hours of paid sick time for the following covered reasons:

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 either (1) subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

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 childcare 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.

Employer Eligibility: Private employers with fewer than 500 employees, and most public employers. There is language allowing regulations to exclude emergency responders and/or businesses with less than 50 employees where the requirements would jeopardize that business as a going concern. Currently, no such exclusions apply.

Employee Eligibility: The full allotment of paid sick time provided for by the Act must be available for immediate use by an employee, regardless of how long the employee has been employed by the employer.

Allotment of Sick Leave: For full-time employees, 80 hours. For part-time hours, emergency sick leave is the number of hours an employee works, on average, over a 2-week period.

No Carryover: Emergency paid sick time provided by the Act does not carry over from one year to the next.

No Payout at Termination: Paid sick time not used at the time of an employee's termination, resignation, or retirement does not need to be paid out to the employee.

May be Used Before Other Paid Leave: Employers may not require an employee to use other paid leave provided by the employer to the employee before the employee uses paid sick time provided for by the Act.

Pay Rate: Paid sick leave must be paid as follows:

- At the employee's regular rate, subject to a maximum of \$511 per day and \$5,110 in the aggregate for qualifying conditions (1), (2), or (3) described above.
- At two-thirds the employee's regular rate, subject to a maximum of \$200 per day and \$2,000 in the aggregate for qualifying conditions (4), (5), or (6) described above.

Effective Date: The Act takes effect not later than 15 days after the date the Act is enacted.

Notably, the additional paid sick leave granted to employees under the Act is in addition to any other paid time off employers already provide. Employers, therefore, must be aware that even if they already provide paid sick time based on local requirements, or general paid time off or vacation policies to cover sick-related absences, they must provide the Act's paid sick leave in addition to their already existing time off policies. The Act also specifies that employers cannot adjust such policies prior to the Act's effective date to avoid extending the amount of total paid sick time they are required to give to employees under the Act. Further, employers cannot require that an employee use other paid time off prior to using paid sick time under the Act.

Employers will have to post a notice on their premises in a conspicuous place which informs that seven days after the Act's enactment, the Department of Labor will issue a statement summarizing the requirements of the Act. Employers who have shut down offices or begun to allow employees to work remotely should consider disseminating the notice electronically given that many employees are already working remotely in the effort to combat the spread of the pandemic.

The Act includes anti-retaliation provisions, and any employer who violates the Act's paid sick time obligations will be deemed to have violated the federal Fair Labor Standards Act (FLSA) and will be subject to the FLSA's penalties, including liquidated damages and attorney's fees.

Note that the Act also ensures that employees who work under a multiemployer collective agreement and whose employers pay into a multiemployer plan are provided with leave and paid sick time.

Tax Credits to Employers Who Pay Out Paid Sick and Paid Family and Medical Leave

To help offset the cost of paid leave, the Act provides for credits against quarterly payroll taxes imposed on the employer in an amount equal to 100 percent of the qualified family leave wages and paid sick leave wages paid by an employer, subject to the requirements of forthcoming Treasury Department regulations.