



**KLEHR HARRISON
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Coronavirus (COVID-19) Task Force

The Emergency Families First Coronavirus Response Act: What Employers Need to Know

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March 23, 2020

Agenda

Overview

The Emergency Paid Sick Leave Act

The Emergency Family and Medical Leave Act

Tax Credits

Q&A



Overview

Last week, Congress passed the Families First Coronavirus Response Act (the Act).

Congress's initial response to the national emergency.

Creates mandatory paid sick and family leave obligations on employers with fewer than 500 employees for certain qualifying events.

Employers receive relief in tax credits for added financial burden.

Emergency Paid Sick Leave Act: The Basics

- **Applies to private employers with fewer than 500 employees and covered public employers.**
 - No non-profit exception.
- **DOL can issue regulations exempting small businesses (fewer than 50 employees) from sick leave and family leave requirements.**
 - “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”
 - DOL to provide emergency guidance and rulemaking laying out the standard for exemption.
 - The criteria will be “simple and clear.”
- **Employees are immediately eligible.**
- **Compliance by April 2, 2020.**
- **Expires on December 31, 2020.**



Paid Sick Leave: Qualifying Reasons

- **Qualifying reasons if the employee cannot work or telework because:**
 - The employee is subject to a government quarantine or isolation order related to COVID-19.
 - The employee has been advised to self-quarantine by a health care provider.
 - The employee is seeking medical diagnosis for COVID-19.
 - The employee is caring for any individual subject to quarantine by government order or advice of a health care provider.
 - Employee is caring for their child due to school closure or childcare provider unavailability due to COVID-19.
 - Substantially similar conditions specified by the Secretary of Health and Human Services.
- **Health care providers & emergency responders may choose to exempt employees/DOL can issue regulations excluding same.**



Paid Sick Leave: Payment Obligations

- **Pay calculated using regular rate of pay (or applicable minimum wage, if greater) for time on leave but not to exceed:**
 - \$511/day or \$5,110/aggregate for first three qualifying reasons; or
 - \$200/day or \$2,000/aggregate for second three qualifying reasons.
- **Part-time employee with variable schedule: generally, average daily hours over 6-month lookback, including any hours employee was on a leave.**



Amount of Paid Sick Leave

Full-time employees: 80 hours.

Part-time employees: Number equal to the average number of hours employee works over a two-week period.

No accrual requirement.

Sick leave available for immediate use, regardless of length of employment.

No carryover into the next year.

Paid Sick Leave: Prohibited Activities

Employee cannot be required to find replacement employee for missed time.

Employer may not require use of other paid leave pursuant to policy or law before employee can use paid sick time.

No discharge, discipline or discrimination for taking leave, filing a complaint, or testifying in proceeding.



Paid Sick Leave: Notice Requirement

Notice must be posted where employee notices customarily posted on employer premises.

DOL to make available model notice this week.

Question: how do employers give notice where physical premises shuttered?

Paid Sick Leave: Penalties/Enforcement

FLSA's enforcement regime.

Enforcement action by DOL or employee.

Unpaid wages, liquidated damages, equitable and injunctive relief, and attorneys' fees and costs.



Paid Sick Leave: Miscellaneous

No preemption: the law does not diminish other rights employees may have pursuant to collective bargaining agreement, existing policy, or other law.

Employers participating in multiemployer CBA can satisfy law by contributing into fund or plan based on employee's hours provided employee can secure pay from fund.

After first day of paid sick time, employer can require employee to follow reasonable notice procedures.

No payout of unused time upon separation.

Covered employer includes successor in interest.



Emergency Family and Medical Leave Expansion Act: The Basics

- **Amends the FMLA.**
- **Applies to private employers with fewer than 500 employees and covered public employers.**
 - No non-profit exception.
- **DOL can issue regulations exempting small businesses (fewer than 50 employees) from sick leave and family leave requirements.**
 - “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”
 - DOL to provide emergency guidance and rulemaking laying out the standard for exemption.
 - The criteria will be “simple and clear.”
- **Provides up to 12 weeks of paid and/or protected leave for qualifying reasons.**
- **Employees are eligible after 30 days of employment.**
- **Compliance by April 2, 2020.**
- **Expires on December 31, 2020.**



Paid Family Leave: Qualifying Reasons

- **Limited qualifying reasons. Employee is unable to work or telework:**
 - To care for employee's child (under 18 years old);
 - Due to COVID-19-related declared public health emergency; **AND**
 - The child's school or place of care has been closed; **OR**
 - The child's care provider is unavailable.
- **More limited scope than original draft of legislation.**
 - Care for other familial relationships subject to traditional FMLA.

Paid Family Leave: Qualifying Reasons (cont'd)

Public Health Emergency: an emergency with respect to COVID-19 declared by government authority.

Child Care Provider: a provider who receives compensation to provide childcare services on a regular basis.

Son or daughter: biological, adopted, or foster child, stepchild, legal ward, or child of person standing in loco parentis.



Paid Family Leave: Payment Obligations

- **First 10 days are unpaid.**
 - Can use paid sick leave if qualify.
 - Can use other PTO as applicable.
- **After 10 days:**
 - Employee paid at no less than 2/3rd of regular rate.
 - Cap of \$200/day or \$10,000/total.
 - After cap hit, the remainder of the leave is unpaid.
- **Part-time employee with variable schedule: generally, average daily hours over 6-month lookback, including any hours employee was on a leave.**
- **Regular rate: same meaning as under FLSA.**



Paid Family Leave: Position Restoration Rights

- **Employer required to return the employee to work in the same or substantially similar position, as under FMLA.**
- **Employer with fewer than 25 employees exempted if:**
 - The employee's position does not exist due to economic conditions or changes in operating conditions that affect employment and are caused by public health emergency;
 - Employer takes reasonable efforts to restore employee to equivalent position; and
 - If no equivalent position, takes reasonable efforts to contact employee if equivalent position becomes available (for 1 year).



Paid Family Leave: Miscellaneous

Employee must give notice for leave where foreseeable as is practicable.

Health care providers & emergency responders may choose to exempt employees/DOL can issue regulations exempting same.

Employers part of multiemployer CBA may satisfy by making contributions to fund/plan similar to as under paid sick leave.

Paid Sick Leave: Penalties/Enforcement

Part of FMLA – same penalties/enforcement.

Enforcement action by employee or DOL.

Wages, liquidated damages, equitable relief

Employers with fewer than 50 employees not subject to civil actions by individuals.

Paid Sick and Family Leave: Compliance Grace Period

DOL will issue a 30-day non-enforcement policy to give time to employers to come into compliance.

DOL will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with the Act.

DOL will instead focus on compliance assistance during the 30-day period.

But no grace period for employee civil actions.



Compliance Steps



Determine if covered.



Draft policies for compliance.



Operational considerations and contingency planning.



Notification to employees.



Tax Credits

The law makes available tax credits up to equal the maximum amounts that the employers must pay to employees under the sick and family leave pieces.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

Under law, and subject to forthcoming guidance from IRS, employers will be able to retain the amount of payroll taxes equal to the amount of qualifying leave they have paid.

If the amount the employer retains is not sufficient to cover the costs of the qualified leave, the IRS will allow employers to seek an expedited advance from the IRS. The IRS expects to process these requests in two weeks or less.

Tax Credits (cont'd)

Employers are also entitled to a credit for health insurance costs required to maintain insurance for employees during their leave periods.

The tax credit is available immediately. If employers begin paying their employees sick time leave now, they will receive a tax credit for those payments. No delay to April 2 needed.

Tax-exempt employers with fewer than 500 employees can use the credit to offset their payroll tax liability.



Tax Credits: IRS Examples

If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.

If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Equivalent childcare leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.



Conclusion

The Act is Congress's first response to national emergency. More response is on the way.

Employers need to be thoughtful about implementing policies to comply ASAP.

Look for DOL regulations implementing provisions and DOL/IRS guidance.

Thank You

For questions or more information, please contact:

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