

Families First Coronavirus Response Act 2020

On March 18, 2020 the federal government passed, and signed into law, the ***Families First Coronavirus Response Act*** (the “Act”) to help employees and businesses facing challenges related to the coronavirus. The Act, temporarily expands coverage and eligibility under the federal Family and Medical Leave Act (FMLA) for reasons relating to the COVID-19 pandemic, including temporary leave provisions.

The provisions of the Act become effective 15 days after the law was enactment and ends on December 31, 2020. This means beginning April 1, 2020 affected employers will need to adjust their employment and payroll practices comply.

The Families First Coronavirus Response Act guarantees;

- free coronavirus testing,
- secures paid emergency leave,
- enhances Unemployment Insurance,
- strengthens food security initiatives, and
- increases federal Medicaid funding to states.

Key Provisions

Expanded Family and Medical Leave

As of now, employees of all private employers with fewer than 500 employees¹ along with government employers, who have been on the job for at least 30 days, are provided with 12 weeks of paid family and medical leave if they are unable to work (or telework), due to a need for leave to care for a child of the employee if the child’s school or place of care has been closed or if the child care provider is unavailable, due to the coronavirus.

- The **first 10 days of the leave does not have to be paid under FMLA**. However, employees may use any accrued paid time off, including vacation and sick leave, to cover this initial 10-day period.
- To the extent an employee needs leave beyond the initial 10-day period and continues to meet the requirements for paid leave under the FMLA, the **employee is to be paid not less than two-thirds of the employee’s regular rate of pay** for the regular hours worked.

¹ Current FMLA regulations used for calculating the employee threshold for coverage purposes will apply in determining whether interrelated entities are examined together under the Act. As set forth in § 825.104, “[w]here one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the joint-employment test discussed in § 825.106, or the integrated-employer test contained in paragraph (c)(2) of this section.” Employers ordinarily resist classifying separate entities as a single employer for virtually every other labor and employment issue and should proceed cautiously in taking a different position just to reach an employee count to avoid coverage, as that would likely have a significant impact if the same issue arises in other contexts.

- In no event, however, shall the paid leave exceed \$200.00 per day and \$10,000.00 in the aggregate.
- **Employers will receive a payroll tax credit for the qualified sick leave wages paid** out by the employer, subject to caps based on the reason for the leave and daily maximums.

Employers are required to restore employees to their same or similar position unless the following conditions are met:

- The employer has fewer than 25 employees;
- The position held by the employee no longer exists due to economic or other operating conditions that affect employment, and which are caused by the public health condition;
- The employer attempts to restore the employee to a similar position;
- The attempts to restore the employee to a similar position fail, and the employer notifies the employee that such a position was available.

Paid Sick Leave

All employers with fewer than 500 employees are required to provide two weeks of paid sick leave to their employees. Paid sick leave can be used for the following reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to coronavirus;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to coronavirus;
3. The employee is experiencing coronavirus symptoms and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order as described in reason (1) or has been advised as described in reason (2);
5. The employee is caring for a son or daughter of the employee if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to the coronavirus; or
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.

Employees who go on paid sick leave for reasons (1), (2), or (3) will be paid at their regular rate of pay. Employees who use their leave for reasons (4), (5), or (6) will be paid at two-thirds the employee's regular rate of pay. In no event, however, shall the paid sick leave exceed \$511.00 per day and \$5,110.00 in the aggregate for reasons (1), (2), or (3), or \$200.00 per day and \$2,000.00 in the aggregate for reasons (4), (5), or (6).

Full-time employees are entitled to two weeks (80 hours) and part-time employees are entitled to the typical number of hours they work in a typical two-week period.

Employers cannot require employees to use other paid leave provided by the employer before using Paid Sick Leave under the Families First Coronavirus Response Act, once the law goes into effect. This means prior to April 1, 2020 employers are free to require employees to use any and all accrued sick, vacation and/or PTO time that might be available. Once the law goes into effect, employees may use accrued sick leave to cover the first 10 days of unpaid leave under the FMLA provisions of the Act and employers with existing sick leave policies must provide paid

sick leave under the Families First Coronavirus Response Act in addition to the employee's use of accrued company sick leave available.

Employers can receive a payroll tax credit for the qualified sick leave wages paid out by the employer under the Act, subject to caps based on the reason for the leave and both daily and quarterly maximums.

COVID-19 Testing

Effective immediately, the Families First Coronavirus Response Act requires all private health plans to provide coverage for COVID-19 diagnostic testing, including the cost of a provider, urgent care, and emergency room visits in order to receive testing. Coverage for testing must be provided at no cost to the consumer.

Unemployment-Related Provisions

This section of the overall act has been called the **Emergency Unemployment Insurance Stabilization and Access Act of 2020**. The biggest breather comes from the provision of \$1 billion as emergency grants to states for the processing and payment of unemployment insurance benefits. There is also a \$500 million additional fund for staffing, technology requirements, systems, and other administrative costs.

To obtain this \$500 million assistance, the States have to:

- Make it mandatory for employers to notify the laid-off employees about potential UI eligibility,
- Provide ways to apply for UI by phone, in person, or online,
- Keep applicants informed about the status of their application, and
- temporarily ease eligibility requirements such as work search and waiting period so that more people can access UI,

Most states have waived the waiting period, work search requirements and allowed part-time workers and the self-employed to file for unemployment benefits. If eligible, individuals will receive a determination letter to that effect.

The new law does not require claimants to do anything outside of the ordinary application process to claim unemployment insurance benefits. It is best to file claims online as most states have a shortage of staff across unemployment offices due to the massive surge in UI applications. There will likely be delays if you try phone filing or in-person visits.

(Note: Unfortunately, no provision in this section of the Act was made for nonprofits who are exempt under federal law from participating in federal unemployment insurance. Consequently, unless an subsequent exception to the law is made employees of exempt organizations will not qualify for unemployment under either federal and state plans.)

Exclusions

Small businesses with fewer than 50 employees may seek an exemption from the expanded FMLA requirements from the Secretary of Labor if the business can show that compliance with the law would jeopardize the viability of the business as a going concern. So we recommend you

begin now to put together any documentation that will be needed to substantiate any claim that might be submitted. (Note: the Secretary of Labor will provide guidance on how to file for an exemption in the coming days. Until then however, do not attempt to submit an exemption application).

The Act also authorizes the Secretary of Labor to exclude certain health care providers and emergency responders from providing extended Family and Medical Leave. At present it is unclear when and how employers are to file for the exemption or how these exclusions will be defined and applied.

Additional Provisions

The Families First Coronavirus Response Act also contains provisions to ensure that children and low-income seniors have access to meals and that there is adequate funding for unemployment compensation for eligible individuals. The one-week waiting period for unemployment compensation will remain up to the states, but the Act will provide for temporary federal matching for the first week for those states with no waiting week.

Open Issues

A number of questions remain unanswered related to the Families First Coronavirus Response Act, which may be clarified by the regulations or a technical correction, including:

- What certification can be required by employers to address potential abuse of the new paid leave.
- Notice requirements and whether employers need to revise their current FMLA policies to incorporate these temporary new benefits.
- How payments under any employer short-term disability policy can be coordinated with payments required under the expanded FMLA leave.
- Whether employees are eligible for payment under the Act if already on absence for another reason prior to the effective date of the Act.
- Whether employees who are laid off before the effective date of the Act are entitled to the expanded FMLA leave pay and job restoration rights.
- Whether potentially exempt employers can immediately exempt themselves from the new requirements while simultaneously applying for an exemption from the Secretary of Labor.
- Whether the employees of employers exempt from participation in federal and state unemployment programs will be eligible for unemployment assistance under the expanded provisions.

Impact on Religious Nonprofits

As currently understood, all religious nonprofits who otherwise meet the definition of an employer under the Act are required to comply with these new provisions of the FMLA unless they successfully receive an exemption from the office of the Secretary of Labor.

Potential abuse of the new paid leave provisions is likely to occur and employers may find reason at times to suspect such abuse is being attempted by an employee(s). However, whether or not an employer is within their rights to deny coverage under the expanded provisions is unclear. Employers should take care not to deny coverage to an employee unless there is clear

and substantiated evidence to support their position that the employee does not qualify for the expanded coverage benefits.

Small employers who believe they qualify for an exemption from the expanded provisions should immediately contact their tax professionals for assistance in petitioning the Secretary of Labor for an exemption. Likewise, employers should use their tax professional to determine how they can file for and receive a credit or refund from the Federal Government for any benefits paid out under the expanded provisions.

Finally, employers should seek assistance from a qualified attorney experienced in employment law matters if they have any questions about how the expanded regulations apply to their situation.²

Text of the Bill

<https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

Links to Additional Articles

[ADP.pdg](#)

<https://www.foley.com/en/insights/publications/2020/03/update-families-first-coronavirus-response-act-law>

[FFCRA FAQ](#)

² If you do not have an attorney we would recommend contacting Ms. Rona Layton (<http://www.laytonlawfirm.com/attorney.html>), an employment law attorney located in California's Silicon Valley who specializes in serving small- to medium-sized businesses and nonprofit corporations.