

The Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act: A Summary for Employers

As part of the Families First Coronavirus Response Act, which was signed by President Trump on March 18, Congress enacted the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. Both of these enactments impose significant new obligations on employers. Here is a summary of what employers need to know.

The Emergency Family and Medical Leave Expansion Act

The federal “Emergency Family and Medical Leave Expansion Act” creates a new category of leave protected under the Family and Medical Leave Act of 1993 (FMLA). This legislation, effective “not later than 15 days after the date of enactment” (which will be April 1 according to the USDOL guidance) applies to covered private sector employers with less than 500 employees and to covered public sector employers.

New FMLA Leave for Qualifying Needs Related to a Public Health Emergency

This new “Public Health Emergency” leave is expressly targeted at the coronavirus and requires leave to be granted when an employee is unable to work (or telework) due to the need to care for a daughter or son under the age of 18, if that child’s elementary school, secondary school, or place of care has been closed, or if the paid “child care provider” of such son or daughter is unavailable, due to a “public health emergency,” e.g., COVID-19.

Employees are eligible for leave under this “public health emergency” provision, so long as they have been employed for 30 days (as opposed to the usual 12 months and 1,250 hours required for other forms of FMLA leave).

Importantly, the legislation expressly permits employers of health care providers and emergency responders to exempt such employees from the above leave provisions. The legislation additionally states that the Secretary of Labor may, via regulatory action, exempt small businesses with less than 50 employees from these requirements, if compliance “would jeopardize the viability of the business as a going concern.” However, the statute itself does not set forth such an exemption.

As with the current FMLA, employees on approved leave due to a “public health emergency” must be restored to either: (1) the position of employment held by the employee when the leave commenced; or (2) to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. However, this reinstatement right may not apply to employers with fewer than 25 employees, if the position held previously by the employee no longer exists due to economic conditions or other changes in operating conditions, and so long as other specific requirements are met.

Paid FMLA Leave for Qualifying Needs Related to a Public Health Emergency

Unlike other forms of FMLA leave, employees are eligible for paid leave when there is a “Qualifying Need Related to a Public Health Emergency.”

According to the legislation, this paid FMLA leave commences after an employee has utilized 10 days of covered leave under the “Public Health Emergency” provision. During this initial 10-day period, employees may elect to substitute any accrued, unused vacation leave, personal leave, or medical or sick leave, for unpaid leave, in accordance with their employer’s policies.

After the initial 10-day period, employers must pay employees for each day of further leave. This pay must be equal to not less than two-thirds of the employee's regular rate of pay (as determined under the Fair Labor Standards Act) multiplied by the number of hours the employee is normally scheduled to work on the day in question. The legislation also specifies a calculation method for employers to use with employees who work variable schedules. The amount of benefits payable to an individual employee is capped at \$200 per day and \$10,000 total. Different requirements may apply to employers who are parties to multi-employer bargaining agreements.

Employers will be eligible to apply for tax credits each calendar quarter to offset the qualified family leave wages paid to eligible employees.

The Emergency Paid Sick Leave Act

The federal "Emergency Paid Sick Leave Act" establishes a new paid sick time benefit – as a companion to the expanded FMLA benefits discussed above – to further help employees impacted by COVID-19.

The legislation will also be effective "not later than 15 days after the date of enactment" (which will be April 1 according to the USDOL guidance) and requires covered private sector employers with less than 500 employees and covered public employers with one or more employees to provide paid sick time to their workers because:

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 subject to an order as described in category 1 above or who has been advised as described in category 2 above;
5. The employee is caring for a son or daughter, if the elementary school, secondary school, or place of care has been closed, or if the paid "child care provider" of such child is unavailable, due to COVID-19; or
6. The employee is experiencing any other "substantially similar condition" specified by designated federal officials.

Notably, employers of employees who are health care providers or emergency responders may elect to exclude such employees from the above requirements. As with the expansion of FMLA discussed above, this legislation also states that the Secretary of Labor may, via regulatory action, exempt small businesses with less than 50 employees from these requirements, if compliance "would jeopardize the viability of the business as a going concern." However, the statute itself does not set forth such an exemption.

Full-time employees qualifying under the above circumstances will be eligible to receive up to 80 hours of pay. Part-time employees are eligible to receive the average number of hours that they work over a two-week period. The legislation provides specific procedures for employers to use when making calculations for employees who work variable schedules.

Paid sick time must be paid at the employee's regular rate of pay (under the FLSA), at the federal minimum wage rate, or at the applicable state or local minimum wage rate, whichever is higher, with three exceptions. Employees taking paid sick leave under categories 4, 5, or 6 above, as set forth above, must only receive two-thirds of this amount. Different requirements may apply to employers who are parties to multi-employer bargaining agreements. The benefits are capped for each employee at \$511 per day and \$5,110 in the aggregate for leave provided under categories 1, 2, and 3 above, and at \$200 per day and \$2,000 in the aggregate for leave provided under categories 4, 5, and 6 above.

Paid sick time under this legislation must be provided immediately to eligible employees, regardless of how long they have been employed. Such time cannot be carried over from one year to the next. The legislation also imposes several other new requirements for employers.

Among other things, the legislation indicates that employers may not require an employee to use other paid leave benefits before the employee is eligible to use paid sick time under the new legislation. Employers also cannot require employees to find replacement staffing when they are absent due to circumstances qualifying for paid sick time. Additionally, employers are required to conspicuously post notices at work about this new paid sick time benefit, and the Secretary of Labor will publish a model notice for this purpose.

Employers will be eligible to apply for tax credits each calendar quarter to offset the qualified sick leave wages paid to eligible employees.

If you have any questions about this Information Memo, please contact [Andrew D. Bobrek](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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