

Legal Update

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UPDATED: BREAKING NEWS: FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (the “Act”). It is designed to provide emergency relief to address the profound impact of the coronavirus (COVID-19) and help to soften its effects on millions of Americans. The Act addresses matters such as emergency family and medical leave, paid sick leave, unemployment insurance, tax credits for employers, free testing, and food assistance programs. This newsletter highlights some of the ways that the sweeping legislation will affect employers and employees.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Overview: The Emergency Family and Medical Leave Expansion Act (the “Expansion Act”) amends the Family and Medical Leave Act (the “FMLA”). The Expansion Act provides government employees and employees of companies with fewer than 500 employees with up to 12 weeks of a combination of some unpaid and mostly paid leave from work for a “qualifying need related to a public emergency” with respect to the coronavirus. The only qualifying need identified is if the employee is unable to work (**or telework**) because the employee needs to take leave to care for the employee’s son or daughter under 18 years of age if the child’s school or place of care has been closed, or the son or daughter’s child care provider is unavailable due to a declared public health emergency due to COVID-19.¹ The Expansion Act does not change the rules for leave requested for other reasons available under the FMLA.

Eligible Employee: To be eligible for paid leave under the Expansion Act, an employee must have been employed for at least 30 calendar days by the employer from whom leave is requested. Thus, the FMLA’s more onerous requirements that an employee has been in the employer’s employ for at least 12 months, worked at least 1,250 hours during the 12-month period, and works in a location with 50 or more employees within a 75-mile radius are **not** applicable to leave under the Expansion Act.

Leave Benefits:

Unpaid Leave: The first 10 days of leave under the Expansion Act may be unpaid. An employee may elect to substitute any accrued paid vacation, personal, or medical or sick leave for unpaid leave under the Expansion Act in accordance with Section 102(d)(2)(B) of the FMLA (the provision dealing with substitution of paid leave for a serious health condition).

Paid Leave for Subsequent Days: The remaining time off under the Expansion Act, up to the 12-week ceiling of FMLA leave, will be paid leave.

¹ Prior versions of the proposed legislation had a broader definition of “qualifying need.” It remains to be seen if subsequent legislation will expand the current definition.

Amount / Calculation of Paid Leave: The paid leave shall be **at least two thirds (2/3)** of an employee's regular rate of pay multiplied by the number of hours the employee would be normally scheduled to work. If an employee's schedule varies from week to week such that an employer is unable to determine with certainty the number of hours the employee would have worked if the employee had not taken Expansion Act leave, the employer shall use the following:

- (i) Subject to item (ii) below, a number equal to the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.
- (ii) If the employee did not work throughout that prior six-month period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

Cap on Paid Leave: The amount an employer is to pay an employee on leave is capped at \$200 per day and \$10,000 in the aggregate.

Notice: In any case where the leave allowed under the Expansion Act is foreseeable, the employee is required to notify the employer as soon as practicable.

Restoration: The FMLA provides that an employee on FMLA leave shall be restored to the position of employment he or she held when the leave commenced or be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. Under the Expansion Act, these FMLA provisions **will not apply** to an employer who employs fewer than 25 employees if all of the following conditions are met:

- (A) The employee takes leave under the Expansion Act.
- (B) The position held by the employee when the leave commenced does not exist at the end of the leave due to economic conditions or other changes in the employer's operating conditions that (i) affect employment and (ii) are caused by a public health emergency during the leave period.
- (C) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent benefits, pay, and other terms and conditions of employment.
- (D) If the employer's reasonable efforts under item (C) above fail, the employer makes reasonable efforts during the "Contact Period" (defined below) to contact the employee if an equivalent position described in item (C) above becomes available.

"Contact Period" means the one-year period beginning on the earlier of the date on which the qualifying need for leave related to a public health emergency concludes, or the date that is 12 weeks after the date on which the employee's leave under the Expansion Act commences.

Multi-employer Collective Bargaining Agreements:

Employers who have multi-employer collective bargaining agreements ("CBA") may comply with the Expansion Act by (a) complying with the existing CBA; (b) complying with the applicable bargaining obligations under the CBA; (c) contributing to a multiemployer fund, plan, or program based on the paid leave of each employee; and (d) having the multiemployer fund pay the employee for leave in accordance with the Expansion Act.

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Potential Regulatory Exceptions: The Secretary of Labor has the authority to issue regulations for good cause:

(a) to exclude certain health care providers and emergency providers from the definition of eligible employee, and

(b) to exempt small businesses with fewer than 50 employees from the requirements of the Expansion Act when such requirements would jeopardize the viability of the business as a going concern.

Healthcare Providers and Emergency Responders Excluded: If the employee is a health care provider or emergency responder, the **employer** may elect to exclude that employee from the Expansion Act.

Effective Date and Sunset: According to the Department of Labor, the Expansion Act will take effect on April 1, 2020. The Expansion Act will expire on December 31, 2020.

EMERGENCY PAID SICK LEAVE ACT

Covered Employer Obligation: The Emergency Paid Sick Leave Act (the “Sick Leave Act”) requires, among other things, individuals and private entities with fewer than 500 employees to provide each employee paid sick time to the extent that the employee is unable to work (**or telework**) due to the following reasons for leave related to coronavirus (“Permitted Uses”):

1. The employee is subject to a quarantine or isolation order related to COVID-19.
2. A health care provider has advised the employee 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 a quarantine or isolation order or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for the employee’s child if the child’s school or place of care has been closed, or the child’s child care provider is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition that may be specified by the Secretary of Health and Human Services.

Exceptions: The Sick Leave Act allows employers of employees who are health care providers or emergency responders to opt out and exclude such employees from leave under the Sick Leave Act (additionally, the Secretary of Labor can issue regulations to this effect). The Sick Leave Act also grants the Secretary of Labor the authority to issue regulations for good cause to exempt small businesses with fewer than 50 employees from providing Sick Leave Act leave due to having to care for an employee’s child if this would jeopardize the viability of the business as a going concern.

Duration of Paid Sick Time: Full-time employees are eligible to take up to 80 hours of paid sick time under the Sick Leave Act. Part-time employees are eligible to take up to the number of hours that are equal to the number of hours that such employees work, on average, over a two-week period.

Payment of Paid Sick Time: The Sick Leave Act defines “paid sick time” and how to calculate the required compensation for paid sick time. The paid leave for **absences due to an employee’s own condition** generally is the greater of an employee’s regular rate of pay or the applicable minimum wage, but is limited to no more than \$511 per day and \$5,110 in the aggregate. The paid leave for **absences due to caring for**

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others generally is the greater of two-thirds (2/3) of the employee's regular rate of pay or the applicable minimum wage, and is limited to no more than \$200 per day and \$2,000 in the aggregate. The Secretary of Labor will issue guidelines in the near future to assist employers in calculating proper payment of paid sick time. If an employee's schedule varies from week to week such that an employer is unable to determine with certainty the number of hours the employee would have worked, the employer uses the same calculation as in the Expansion Act.

No Carryover: Paid sick time under the Sick Leave Act does not carry over from one year to the next.

Termination of Paid Sick Time: Paid sick time ceases beginning with the employee's next scheduled work shift immediately following the termination of the need for sick time.

Prohibition: An employer may not require, as a condition of providing paid sick time under the Sick Leave Act, that an employee search for or find a replacement employee to cover the employee's missed hours during the employee's sick time.

Immediate Use of Sick Time: Paid sick time shall be available for an employee's immediate use for Permitted Uses (described above) regardless of how long the employee has been employed. An employee may use the paid sick time for Permitted Uses before using any other type of leave, and an employer **may not require** an employee to use other paid leave using paid sick time for Permitted Uses.

Notice Requirements: Each employer is required to post, in conspicuous places where notices to employees are customarily posted, a notice about the Sick Leave Act approved by the Secretary of Labor, and the Secretary will make a model notice available no later than seven days after the enactment of the Sick Leave Act (which will be March 25, 2020).

No Discrimination or Retaliation: Employers may not discriminate or retaliate against employees for taking leave under the Sick Leave Act or registering complaints, filing proceedings, or testifying under or related to the Sick Leave Act.

Multiemployer Collective Bargaining Agreements: Employers who have multi-employer collective bargaining agreements may comply with the Sick Leave Act if they perform in a manner similar to that required for the Expansion Act. See above.

Rules of Construction: The Sick Leave Act does not require an employer to provide financial or other reimbursement to an employee upon the employee's separation from employment for unused Sick Leave Act leave. Nothing in the Sick Leave Act, however, diminishes the rights or benefits an employee is entitled to under any other law, collective bargaining agreement, or employer policy (even if the other rights are used due to the coronavirus). For example:

- The **Illinois Employee Sick Leave Act** applies to all Illinois employers who provide paid or unpaid personal sick leave benefits (i.e., time off due to personal illness, injury, or medical appointments). This law requires employers to allow employees to use such personal sick leave for absences due to the illness, injury, or medical appointment of an employee's family member—on the same terms that the employee is allowed to use sick leave for their own illness or injury.
- The **Cook County Earned Sick Leave Ordinance** requires Cook County, Illinois employers to allow eligible employees to accrue up to 40 hours of paid sick leave in each 12-month period of their employment—unless the employer sets a higher limit, among other requirements.

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- The **City of Chicago Paid Sick Leave Ordinance** requires covered employees who work in Chicago to accrue up to 40 hours of paid sick leave in each 12-month period of employment—unless the employer sets a higher limit, among other requirements.

Effective Date and Sunset: The United States Department of Labor has stated that the Sick Leave Act and its requirements will take effect on April 1, 2020. The Sick Leave Act expires on December 31, 2020.

Reasonable Notice by Employees: After the first workday or portion thereof that an employee receives paid sick time under the Sick Leave Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid time.

TAX CREDITS FOR PAID SICK AND PAID FAMILY AND MEDICAL LEAVE

Employers are responsible for paying for the Expansion Act and Sick Leave Act benefits. Tax credits will be provided to employers and self-employed individuals for amounts paid under these acts under various circumstances; however, there will be caps on them. As the Secretary of the Treasury needs to issue regulations regarding the credits, and subsequent laws may still alter these provisions, we suggest that you contact your accountant or other tax professional for more information on the availability of these tax credits and how to properly claim them.

EMERGENCY UNEMPLOYMENT STABILIZATION AND ACCESS ACT OF 2020

Under the Emergency Unemployment Stabilization and Access Act 2020, states will be provided with a billion dollars of emergency grants for unemployment insurance to support employees who are off work for certain reasons pertaining to COVID-19. Assuming a State meets certain requirements for notification regarding unemployment benefits, it will receive half of its portion of the emergency grant amount. A State will receive the other half if its unemployment claims have increased by at least 10% over the same quarter from the prior year **and** the State meets certain other requirements regarding (a) maintaining access to the unemployment compensation system, and (b) easing eligibility requirements and access to unemployment compensation, including waiving requirements for work search and waiting periods, and non-charging employers for those impacted by COVID-19.

CONCLUSION

At this point, the Families First Coronavirus Response Act does not apply to employers with 500 or more employees; however, this could change. There may well be other laws passed and regulations made, as COVID 19 is a fluid and rapidly evolving situation. We encourage you to reach out to us or your other professionals with any questions about the Act or any new developments and how they impact you, your business, and your families.

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