

New Federal Law Provides Emergency Paid Sick and Family and Medical Leave

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Practices

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On Wednesday, March 18, 2020, President Trump signed the Families First Coronavirus Response Act that passed both chambers of Congress earlier this week. This new law contains measures to provide additional appropriations for federal agencies, nutrition assistance for school children, expanded access to job-protected and compensated leave for qualifying employees, funding for states' unemployment programs, access to first dollar coverage for COVID-19 testing and treatment, and tax credits intended to reimburse employers required to provide expanded paid leave. This article will focus on those provisions most likely to directly impact employers subject to the new requirements for job-protected leave and paid leave requirements. The relevant provisions go into effect on Thursday, April 2, 2020.

Emergency FMLA Expansion

The Emergency Family and Medical Leave Expansion Act, included as part of the Coronavirus Response Act, requires employers with fewer than 500 employees to provide paid emergency leave for COVID-19-related public emergencies. The new law narrowly defines those emergencies as an employee being unable to work (or telework) because the school or daycare for their son or daughter under 18 years of age is closed or their childcare provider is unavailable. Employees are eligible for emergency leave after 30 days of employment. The law authorizes the Secretary of Labor to issue regulations excluding certain health care providers and emergency health responders, as well as small businesses with fewer than 50 employees if the requirements would jeopardize the viability of the business as a going concern.

The first ten days of the emergency leave are unpaid but employees may elect to substitute any available paid time off, vacation, sick, or medical leave. After the first ten days, the employer must pay two-thirds the employee's regular rate of pay for the hours the employee would normally be scheduled to work. The pay requirement is capped at \$200.00/day up to \$10,000.00 in the aggregate.

At the end of the emergency leave, employers must restore employees to their positions. For employers with fewer than 25 employees, the requirement of position restoration does not apply if the position no longer exists due to economic changes or changes in operating conditions under circumstances related to the public health emergency. Small employers who rely on this exception must make reasonable efforts to restore the employee to an equivalent position with equivalent benefits and pay, and if those efforts fail, to contact the employee if an equivalent position becomes available within a year.

Emergency Paid Sick Leave

The Emergency Paid Sick Leave Act, included as part of the Coronavirus Response Act, also applies to employers with fewer than 500 employees. It requires employers to pay for two weeks of sick leave for employees unable to work because they are subject to a COVID-19-related quarantine or isolation order, advised by health care provider to self-quarantine due to COVID-19 concern, caring for an individual subject to such an order or advice, experiencing COVID-19 symptoms and seeking diagnosis, or caring for a son or daughter if their school or child care is closed due to COVID-19 precautions. Employers of health care providers and emergency responders may elect to exclude those employees. For full-time employees, the act requires pay for 80 hours of work, and for part-time employees, pay equal to the hours they work on a two-week average. The paid sick leave does not carry over to next year. It is capped at \$511/day and \$5,110 in the aggregate for employees who are subject to isolation or quarantine or experiencing symptoms and seeking diagnosis themselves and at \$200.00/day and \$2,000.00 in the aggregate for employees caring for others.

Employers cannot require employees to search for or find replacement to cover emergency paid sick time. Employees are eligible as soon as they are hired—there is no waiting period. Employers may not require exhaustion of other paid leave before employees access this emergency paid leave. The Department of Labor will provide a poster next week and employers will be required to post it like other similar required postings. The law prohibits retaliation for employees requesting or taking leave, and it provides that it should be construed in the employee's favor. Generally, the new rules regarding sick leave and expanded FMLA begin on Thursday, April 2, 2020 (15 days after enactment) and end on December 31, 2020.

Reimbursement Through Tax Credits

The Coronavirus Response Act includes important amendments to the Internal Revenue Code which provide a mechanism for employers to claim reimbursement for the payment of the required sick leave and family and medical leave. Each quarter employers can claim a fully refundable tax credit against payroll taxes for 100% of the emergency paid leave wages paid to employees, with per employee caps of:

- \$511.00 per day when leave is taken for their own self-isolation, diagnosis, or care.
- \$200.00 per day when leave is taken to care for a family member or because of a school closure or unavailability of child care provider.

Additional tax credits are available to employers for the cost of providing group medical plan coverage during the required leave period. Employers will need to work closely with tax advisors to properly claim the available credits. For instance, employers cannot get a “double benefit” by claiming credits and also deducting amounts paid under the new

requirements.

Under the new Coronavirus Response Act upon its enactment and extending for the emergency period, employer-sponsored group medical plans must provide first-dollar coverage for testing and services provided during a health care provider examination resulting in testing for the current COVID-19 virus.

Practical Action to Take Now

Affected employers should take the following practical steps in the time before the law takes effect:

- Implement administrative processes to handle employee leave requests
- Include contingency plans for remote work for administrative employees who might be quarantined
- Cross train multiple employees on the administrative and payroll processes
- Post the required poster when the DOL releases it
- Communicate that your FMLA policy will be interpreted and administrated consistently with the EFMLEA as required by law
- Determine proper administrative practices to apply employee benefit plan eligibility during the employee leave of absences
- Coordinate with group medical plan provider compliance with the COVID-19 testing and treatment rules required under the new law
- Establish accounting practices that will support and facilitate claiming the payroll tax credits available to help fund paid leave provided under the new law

Conclusion

Congress has indicated that this bill is the second part of a package of planned Coronavirus legislation and members have begun working on the third part, which they plan to announce next week. We will continue to monitor and provide updates on government actions designed to deal with the health and economic emergencies caused by COVID-19.

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