



Employment Law Note

March 2020 – COVID-19 Edition

COVID-19 Response Act Creates New Leave Obligations for Employers, Effective April 2



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Late on Wednesday, March 18, President Trump signed the Families First Coronavirus Response Act.

The Act does many things to address the COVID-19 pandemic: among them are the creation of two important new leave obligations for most employers throughout the country. The Act also takes effect in just two weeks - on April 2, 2020 - leaving very little time for employers to begin taking steps to get compliant.

Emergency Paid FMLA Leave

The first new type of leave is a form of emergency paid FMLA leave called "Public Health Emergency Leave."

Ordinarily, the FMLA requires covered employers to provide eligible employees with up to 12 weeks of unpaid leave for use in certain qualifying circumstances. The Families First Coronavirus Response Act amends the FMLA to require employers to allow employees to use their FMLA time in the event that they become "unable to work (or telework)" because the employee has a child under 18 whose "school or place of care has been closed," or whose child care provider is "unavailable," due to any declared emergency related to COVID-19.

After the first ten days of leave, Public Health Emergency Leave becomes paid leave: the employer must begin paying the employee 2/3 of their regular rate of pay, up to a maximum of \$200 per day and \$10,000 in the aggregate, for the duration of the leave.

More interestingly, far more employers and employees fall within the scope of this new law, even if they would otherwise fall outside the FMLA coverage. All employers with fewer than 500 employees must provide Public Health Emergency Leave, even if they would otherwise be too small to qualify for the FMLA. In addition, employees are eligible to take Public Health Emergency Leave after just 30 calendar days of employment.

The job restoration provisions of the FMLA apply to Public Health Emergency Leave as well. However, small employers with fewer than 25 employees can be relieved of this obligation if the employee's position becomes eliminated during the leave as a result of COVID-19-related economic conditions, but only if the employer makes reasonable efforts to find a replacement position for the employee (and those efforts must continue for at least a year).

Lastly, Congress empowered the Department of Labor to issue regulations implementing this FMLA amendment in two specific areas that may be of concern to employers:

- excluding health care providers and emergency responders from being able to take Public Health Emergency Leave
- exempting small businesses (with fewer than 50 employees) from the obligations to provide Public Health Emergency Leave "when the imposition of such requirements would jeopardize the viability of the business as a going concern."

However, it remains to be seen whether (or how) the Department of Labor might implement these types of regulations. Until that happens, health care providers and emergency responders are covered by this law, and there is not yet any exclusion from the law for employers with less than 50 employees.

Emergency Paid Sick Leave

The second new type of leave created by the Families First Coronavirus Response Act is federally-mandated sick leave. This sick leave is limited for use to certain COVID-19-specific situations:

- The employee is subject to a quarantine or isolation order related to COVID-19, or is caring for someone who is subject to such an order.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or is caring for someone who has been so advised.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for a child whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions.
- 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."

Full-time employees get a fixed bank of 80 hours of leave for these reasons. Part-time employees receive a pro-rata amount, based on their average hours

worked "over a 2-week period." The leave is available immediately as of April 2, 2020 (the effective date of the Act) but does not carry over into 2021. This leave is available to all employees, both exempt and non-exempt.

As with Washington's state law, employers cannot require employees to find a replacement as a condition of providing paid sick leave. Employers also cannot require employees to use other forms of paid leave, like PTO, before drawing down federal sick leave, nor can employers combine this form of sick leave with PTO.

There are some limitations to the above. As with Public Health Emergency Leave under the FMLA, private employers must have fewer than 500 employees to be covered by this new sick leave law. Employers of persons who are health care providers, or emergency responders, may exclude those employees from being able to take leave for the above reasons.

Within the next week, the Department of Labor will be publishing a poster of rights under this law that covered employers will be required to post in their workplaces (even if workers are working remotely). The Department of Labor has been empowered to issue regulations implementing the law, so be on the lookout for those as well.

These are important and complex obligations that will require proactive compliance steps by all affected employers. Even though the Act does not take effect for 14 days, employees will begin asking questions today. To be armed with answers to those questions, and to be ready on April 2, please reach out for assistance.

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