

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT - A SUMMARY OF THE PAID SICK LEAVE AND EXPANDED FMLA

MARCH 26, 2020

By **Molly Ryan**

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (FFCRA), which requires certain employers to provide their employees paid sick leave and FMLA leave for specific reasons related to COVID-19. The paid sick leave and expanded family and medical leave requirements are effective April 1, 2020, and they expire on December 31, 2020. Employers subject to the paid sick leave and expanded family and medical leave requirements must post notice of these rights in a conspicuous place in the workplace, and yesterday, the Secretary of Labor provided this model notice for employers to use. Below please find a summary of the additional employee rights/employer responsibilities relating to COVID-19.

Emergency Paid Sick Leave Act

Effective April 1, 2020, all private employers with fewer than 500 employees (at the time the leave is taken) must provide all employees (regardless of the employee's length of employment) up to two weeks of paid sick time for immediate use at the employee's regular rate of pay (not to exceed \$511 per day and \$5,110 in the aggregate) if the employee is unable to work (or telework) 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.

Effective April 1, 2020, all private employers with fewer than 500 employees (at the time the leave is taken) must provide all employees (regardless of the employee's length of employment) up to two weeks of paid sick time for immediate use at two-thirds of the employee's regular rate of pay (not to exceed \$200 per day and \$2,000 in the aggregate) if the employee is unable to work (or telework) because:

1. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee is caring for an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is caring for his/her son or daughter because the son or daughter's school or place of care has been closed, or the son or daughter's child care provider is unavailable, due to COVID-19 precautions.

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4. The employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services.

Emergency Family and Medical Leave Expansion Act

In addition to paid sick time, the FFCRA adds a new qualifying reason for FMLA leave, applicable to all employers with fewer than 500 employees (at the time the leave is taken), and requires that leave taken for the new reason be paid at two-thirds the employee's regular rate of pay (after the first 10 days of leave).

Specifically, effective April 1, 2020, employers with fewer than 500 employees must provide employees who have been employed for at least 30 calendar days up to an additional 10 weeks of paid FMLA at two-thirds the employee's regular rate of pay if the employee is unable to work (or telework) due to a need for leave to care for the employee's child(ren) under 18 years of age if the school or place of care for the child(ren) has been closed or is unavailable due to an emergency with respect to COVID-19 declared by a federal, state, or local authority.

The FFCRA states that the first 10 days of this FMLA leave is unpaid, though this unpaid 10-day period will likely be paid under the paid sick time requirement. After the first 10 days, employers must pay employees taking FMLA for this specific reason for each day of leave at two-thirds their regular rate for "the number of hours the employee would otherwise be normally scheduled to work," not to exceed \$200 per day and \$10,000 in the aggregate. An employee may use accrued PTO to fill the gap between the required rate of pay and the employee's regular pay.

With regard to the employee's return to work, generally, an employee who takes FMLA leave is entitled, on return from such leave, to be restored by the employer to the position the employee held when the leave commenced, or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. However, for employees who take leave provided by the Emergency FMLA Expansion Act and are employed by an employer who has fewer than 25 employees, these "restoration" rights do not apply under specific circumstances detailed in the FFCRA.

Discrimination/Retaliation Prohibited

Employers are prohibited from discriminating or retaliating against any employee who takes paid sick time or expanded FMLA (or FMLA for any reason) and complains about the employers compliance (or lack thereof) or initiates a proceeding related to the FFCRA. This is critical to keep in mind as employers are making difficult business decisions relating to the size of their workforce as a result of the impact of COVID-19.

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Exclusions/Exemptions

Both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act permit employers of an employee who is a health care provider or an emergency responder to exclude such employee for eligibility for paid sick time. The FFCRA gives the Secretary of Labor authority to issue regulations excluding “certain health care providers and emergency responders” from the employees entitled to paid sick time and the expanded FMLA.

The FFCRA also gives the Secretary of Labor authority to exempt small businesses with fewer than 50 employees from providing the expanded FMLA and paid sick time to employees who are unable to work (or telework) because they are caring for their child(ren) due to school and/or childcare closings due to COVID-19 “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

The Department of Labor (DOL) has not yet issued the regulations providing guidance on either of these issues, or the many other issues not addressed in the language of the FFCRA. However, we expect for it to do so prior to April 1, 2020. Until the DOL provides additional information or guidance on these issues, we recommend that employers wait to determine which employees may be excluded – and which businesses may be exempted – from taking paid sick time or the expanded FMLA.

Enforcement Actions

The DOL has stated that it will not bring enforcement actions against employers for violations of the FFCRA occurring from March 18, 2020 through April 17, 2020 if the employer has made reasonable, good faith efforts to comply with the Act. According to the DOL, for purposes of its non-enforcement position, an employer who is found to have violated the FFCRA acts “reasonably” and “in good faith” when all of the following facts are present:

1. The employer remedies any violations upon notice by the DOL, including by making all affected employees whole as soon as practicable.
2. The violations of the Act were not “willful” as previously defined by the U.S. Supreme Court (knowing or showing “reckless disregard for the matter of whether its conduct was prohibited...”).
3. The employer commits in writing to the DOL that it will comply with the Act in the future

After April 17, 2020, the limited stay of enforcement will be lifted.

We will provide additional updates as the DOL issues guidance and the relevant regulations. As always, please do not hesitate to contact us if you have any questions about how these additional leave rights – and any other issue – impact your workplace.

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