

MARCH 19, 2020 | WAGE & HOUR COMPLIANCE

New COVID-19 Federal Paid Leave Requirements Signed into Law

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the "Act") to provide some relief to employees as a result of the Coronavirus ("COVID-19"). This law will go into effect on April 1, 2020 and will expire on December 31, 2020.

The Act includes many provisions which apply to employers, such as paid sick leave for employees impacted by COVID-19 and those serving as caregivers for individuals with COVID-19. Indeed, there are two provisions providing leave to employees forced to miss work because of the COVID-19 outbreak: an emergency expansion of the Family Medical Leave Act (FMLA) and a new federal paid sick leave law. The Act is the first federal law requiring private employers to provide paid sick leave to employees. Importantly, not all private employers are covered, as the Act applies only to private employers *with fewer than 500 employees*. A summary of the most relevant provisions of the emergency expansion of the FMLA and the paid sick law are as follows:

Emergency Family and Medical Leave Expansion Act

The Act substantially expands the FMLA on a temporary basis. Whereas the current employee threshold for FMLA coverage is 50 or more employees, the Act now will cover employers with 1 – 500 employees. It also lowers the one year, 1250-hour eligibility requirement for employees so that now any employee who has worked at least 30 days for their employer prior to the designated leave may be eligible to receive paid family and medical leave. Therefore, many employers not previously subject to the FMLA will now be required to provide job-protected leave to employees for reasons relating to COVID-19.

Specifically, under the Act, covered employers must provide 12 weeks of paid family and medical leave to those unable to work or telework because they are caring for a child if the child's school or place of care has been closed or the child care provider is unavailable due to COVID-19. Note that this is the only qualifying event for this emergency FMLA and is much more limited than the prior version of the bill passed by the House of Representatives.

As mentioned above, all employees who have worked for the employer for 30 days are eligible for this leave. The first 10 days of the leave may be unpaid, unless the employee chooses to use accrued paid time off, such as vacation and sick leave, to cover this initial 10-day period. Thereafter, assuming an employee needs leave beyond the initial 10-day period and continues to meet the requirements for paid leave, the employer will be

required to pay the employee not less than two-thirds of their regular rate of pay for the regular hours worked, up to a maximum amount of \$200.00 per day and \$10,000.00 in the aggregate.

As with the FMLA generally, upon an employee's return from leave, employers are required to restore employees to their same or similar position. However, employers with less than 25 employees are generally excluded from this job restoration requirement if the employee's position no longer exists following the emergency FMLA leave due to an economic downturn or other circumstances caused by COVID-19. Please note though that even if an employer is excluded from this requirement, that employer still make reasonable attempts to return the employee to an equivalent position and, if none exists, to make efforts to return the employee to work for up to a year following the employee's leave.

Importantly, the Act authorizes the Secretary of Labor to exclude certain health care providers and emergency responders from providing extended Family and Medical Leave, as well as small businesses with fewer than 50 employees if providing the leave would jeopardize the viability of the business as a going concern. At this point, however, there is no guidance as to how this exemption would be determined.

Paid Sick Leave

Under the Act, covered employers must give emergency paid sick time to any employee, *regardless of the length of employment*, for a qualifying emergency related to COVID-19. Specifically, employers with fewer than 500 employees are required to provide two weeks (80 hours) of paid sick leave to their full-time employees (while part-time employees are entitled to the typical number of hours they work in a typical two-week period) for the following reasons:

- (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 COVID-19 symptoms and seeking a medical diagnosis;
- (4) The employee is caring for an individual (this does not have to be a family member) who is subject to an order as described in reason one above or has been advised as described in reason two above;
- (5) The employee is caring for his/her child if the school or place of care of child has been closed due to COVID-19 or the childcare provider is unavailable due to COVID-19; or
- (6) 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.

Importantly for employers, there is a difference in the employee's rate of paid sick leave depending on the reason for the leave. Employees who go on paid sick leave for reasons one, two, or three above must be paid at their regular rate of pay (which shall not exceed \$511.00 per day and \$5,110.00 in the aggregate), whereas employees who go on paid sick leave for reasons four, five or six above must be paid at two-thirds their regular rate of pay (which shall not exceed \$200.00 per day and \$2,000.00 in the aggregate). The bill requires the

Secretary of Labor to issue guidelines to assist employers in calculating paid sick time within 15 days of the bill's enactment

Employers *cannot* require employees to use other paid leave before using Paid Sick Leave under the Act. As a result, employers with existing sick leave policies must provide paid sick leave under the Act *in addition to* the existing leave available. After the first day that an employee receives paid sick time, an employer may require that employee to follow reasonable notice procedures in order to continue receiving paid sick time.

Tax Credit for Employers

The Act provides tax credits for employers who are required to provide Emergency Paid Family and Medical Leave and Paid Sick Leave, which are allowed against the employer portion of Social Security taxes. Employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

For the Emergency Family and Medical Leave Expansion Act, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages for each calendar quarter. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Not surprisingly, only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

For the Paid Sick Leave portion, employers will be entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid for each calendar quarter. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.

Notice Requirements

The Act also requires employers to post and keep posted, in conspicuous places, notice of the emergency paid sick leave requirements. Within seven days of the enactment of the bill, the Secretary of Labor will provide a model notice for use by employers. Although the Act is silent on whether the notice can be sent electronically, given that most employees are no longer working in offices for the time being, it is likely that the notice could be sent via email or through other electronic means.

Conclusion

Now that the bill has been signed into law, employers should act swiftly to train employees and revise their FMLA and sick leave policies where necessary to ensure that employee leaves are administered in accordance with the Act. And, to the extent employers otherwise have not had to comply with the FMLA because they have less than 50 employees within a 75-mile radius, those employers will now need to draft a FMLA policy and comply with the notice requirements.

Given that the Act was drafted and amended so quickly, there are still many outstanding issues that may be addressed in the coming weeks. We will continue to closely monitor all new developments regarding this crucial issue.

