

New Federal Laws Extend Paid Leave and Job Protection for Employees Affected by COVID-19

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act, which includes two provisions designed to extend job protection and pay for employees affected by COVID-19. Both of these provisions are applicable only to employers with **fewer than 500 employees** and go into effect on **April 2, 2020**. Both provisions also sunset on **December 31, 2020**. Covered employers will be reimbursed over time because they are (under separate tax credits) entitled to a **payroll tax credit** equal to 100 percent of the qualified sick leave wages by an employer over that calendar quarter. Both provisions also give the Secretary of Labor the **power to exempt small business** (i.e., those with fewer than 50 employees) if the “imposition of such requirements would jeopardize the viability of the business as a going concern.” There is no guidance yet from the Department of Labor regarding this exemption process.

I. The Emergency Family Medical Leave Expansion Act

The Emergency Leave and Family Medical Leave Expansion Act (the “Expansion Act”) amends and supplements the Family and Medical Leave Act (the “FMLA”). As you know, there are a number of qualifying reasons for leave under the FMLA, but the statute covers only employers with 50 or more employees, and those employees are eligible only if they have worked for the employer for twelve months and worked at least 1,250 hours in the twelve-month period prior to the start of the requested leave. The Expansion Act changes these basic requirements **but only** as to the single new qualifying event added by the Expansion Act.

1. The **sole qualifying reason** for leave under the Expansion Act is that an employee is unable to work (or telework) because of a “need for leave to care for the son or daughter under 18 years of age of such employee **if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.**”
 - a. The phrase “public health emergency” is defined as an “emergency with respect to COVID-19 declared by a Federal, State, or local authority.”
2. The eligibility requirements for this narrow form of additional leave have been loosened; an employee is eligible for leave under the Expansion Act if the employee has been **employed for at least 30 calendar days.**
3. The Expansion Act applies to all private employers with fewer than 500 employees, **including those with fewer than 50 employees.**
4. The Expansion Act provides that the first ten days of such leave may be unpaid, but clarifies that an employee has the option to substitute any accrued paid leave during the first ten days.
5. The Expansion Act provides that leave beyond ten days **shall be paid.**
 - a. The rate of pay for such leave is, generally speaking, two-thirds of the employee’s “regular rate of pay” for the hours that the employee would otherwise work and is capped at \$200 per day and \$10,000 total.

6. Leave taken under the Expansion Act is job-protected. Employers with fewer than 25 employees do not have to restore an employee to his or her position if all of the following conditions are met:
 - a. The position held by the employee goes away due to economic conditions that:
 - i. Affect employment; **and**
 - ii. Are caused by a public health emergency
 - b. The employer makes some reasonable effort to restore the employee to an equivalent position for one year following the use of leave.

II. The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (the “Paid Sick Leave Act”) covers many more employees than the Expansion Act, although the pay is more limited and it does not extend job protection. To the extent that the two statutes overlap, i.e., for a parent who must care for children who are home because of school and daycare closures, the employee would be entitled to the ten paid weeks under the Expansion Act plus the two paid weeks under the Paid Sick Leave Act. Unlike with the Expansion Act, there is no minimum service requirement under the Paid Sick Leave Act.

1. Employees of covered employers are eligible for paid sick leave if:
 - a. The employee is unable to work (or telework) because of a need for leave due to any of the following reasons:
 - i. The employee is subject to a federal, state, or local quarantine order or isolation order relating to COVID-19;
 - ii. The employee has been advised by his or her healthcare provider to self-quarantine due to COVID-19-related concerns;
 - iii. The employee is currently experiencing symptoms of COVID-19 and is seeking a diagnosis from a physician;
 - iv. The employee is caring for someone (including a non-family member) subject to a federal, state, or local quarantine or isolation order relating to COVID-19; or
 - v. The employee is caring for his or her child if the child’s school or daycare has been closed, or the child care provider is unavailable, because of COVID-19-related precautions.
2. The amount of paid sick leave that is available depends on whether the employee is a full-time employee or a part-time employee:
 - a. Full-time employees are eligible for up to **80 hours** of such leave.
 - b. Part-time employees are entitled to paid sick leave equivalent to the number of hours worked by the employee, on average, during a two-week period.
3. There is no carryover of leave under the Paid Sick Leave Act to any following year.

4. Employers are **not permitted** to require employees to use other forms of paid leave before employees use leave available to them under the Paid Sick Leave Act.
5. The amount of money that an employee must be paid varies depending on various factors:
 - a. There is a cap of \$511 per day (and \$5110 in the aggregate) for leave taken for the following reasons:
 - i. The employee is subject to a federal, state, or local quarantine order or isolation order relating to COVID-19;
 - ii. The employee has been advised by his or her healthcare provider to self-quarantine due to COVID-19-related concerns; or
 - iii. The employee is currently experiencing symptoms of COVID-19 and is seeking a diagnosis from a physician.
 - b. There is a cap of \$200 per day (and \$2000 in the aggregate) for leave taken for the following reasons:
 - i. The employee is caring for someone subject to a federal, state, or local quarantine or isolation order relating to COVID-19; or
 - ii. The employee is caring for his or her child if the child's school or daycare has been closed, or the child care provider is unavailable, because of COVID-19-related precautions.
 - c. Subject to the caps, an employee is entitled to the greater of:
 - i. His or her "regular rate of pay";
 - ii. Federal minimum wage; or
 - iii. A higher state or local minimum wage as applicable.
 - d. If leave is taken to care for someone else, then an employee is entitled to 2/3 of the amount referenced above (i.e., the "regular rate of pay," federal minimum wage, or a higher state or local minimum wage as applicable)
6. It is illegal to terminate or otherwise discipline an employee for using leave under the Paid Sick Leave Act.
7. Violations of the Paid Sick Leave Act are deemed to be violations of the Fair Labor Standards Act (i.e., the federal wage-and-hour law).

The Secretary of Labor is supposed to issue guidelines to employers regarding calculations of paid sick time (which are quite complicated) within 15 days of March 18, 2020.