

PRESIDENT SIGNS FAMILIES FIRST CORONAVIRUS RESPONSE ACT

By Sally Piefer and Oyvind Wistrom

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Last evening the President signed the Families First Coronavirus Response Act. The legislation had passed the Senate only hours before. The Response Act has a number of provisions which employers must be aware of—an expansion of the federal Family & Medical Leave Act (FMLA) and a paid sick time.

Expansion of the FMLA

The expanded provisions, which provide coverage for public health emergency leave, are in place through December 31, 2020, and this public health emergency leave covers all employers with fewer than 500 employees. This is a significant departure from the current provisions of the FMLA—which apply to employers with 50 or more employees who work within a 75-mile area. An eligible employee is one who has been employed with the employer for at least 30 calendar days.

The new leave provides coverage for employees who are unable to work (or telework) because they need leave to care for a child (under age 18) if the child's elementary or secondary school or place of care has been closed or if the child care provider is unavailable because of a public health emergency. Of course, the term "public health emergency" means an emergency with respect to COVID-19 declared by a federal, state or local authority. This is the only qualifying need for emergency FMLA leave and is a departure from the earlier version of the bill.

The specific leave provisions allow an employee to take up to 12 weeks of job-protected leave. If the need for such leave is foreseeable, the employee must provide notice of leave as soon as practicable. The first 10 days of leave are unpaid, but the employee may substitute available paid leave. After the first 10 days, the employer must provide paid leave for each day the employee takes leave, up to a maximum of 12 total weeks of leave. Pay for the employee must be at no less than 2/3 of the employee's regular rate of pay for each hour the employee would normally be scheduled to work. Special rules are in place for employees who have variable work schedules. The pay is also capped at \$200 per day and \$10,000 in total.

Employees are also generally entitled to reinstatement—but restoration is not required of an employer with less than 25 employees if (i) the position the employee held does not exist due economic conditions or other conditions caused by the public health emergency; (ii) the employer makes a reasonable effort to restore the employee to a position similar to the one held before the leave, with equivalent pay, benefits and other terms and conditions of employment; and (iii) if the employer's reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the earlier of the 1-year period after the public health emergency concludes or the date which is 12 weeks after the date the employee's leave began.

Employers who are subject to a multi-employer collective bargaining agreement (CBA) can fulfill their obligations under this FMLA expansion by making contributions to the fund, plan or program based on the paid leave provisions provided under the CBA.

Emergency Paid Sick Leave

The Emergency Paid Sick Leave Act provisions of the legislation mandate that employers who employ less than 500 employees provide limited paid sick leave to employees who are unable to work (or telework) because of leave needed for any of the following reasons:

1. The employee is subject to a state, federal or local quarantine or isolation 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 is seeking a medical diagnosis;
4. The employee is caring for an individual subject to a state, federal or local quarantine or isolation related to COVID-19;
5. The employee is caring for their child if the child's school or place of care has been closed, or the child care provider is unavailable due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar conditions specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

All employees are eligible for the emergency paid sick leave—regardless of the length of their employment. After the first workday an employee needs leave, the company may require an employee to follow its normal call-in procedures to continue receiving paid sick time. However, employers may not require employees to first exhaust other available paid leave before providing emergency paid sick leave. This emergency leave *is in addition to*, other leave which an employer may already provide under existing policies or CBAs.

For full-time employees, the paid sick leave is limited to 80 hours; for part-time employees, the paid leave is equal to the number of average hours that an employee works during a 2-week period.

The sick leave is paid at the employee's regular rate of pay for qualifying leave reasons 1-3 above, but only at 2/3 of the employee's regular rate of pay for qualifying reasons 4-6. Paid sick leave is calculated at not less than the greater of the following: (i) the employee's regular rate of pay, (ii) the federal minimum wage or (iii) the state minimum wage in the state in which the employee is employed. The pay is further limited and shall not exceed \$511 per day (or \$5,110 in the aggregate) for leave connected with reasons 1-3 above, and shall not exceed \$200 per day (or \$2,000 in the aggregate) for reasons 4-6 above. Different rules apply for employees with variable work schedules.

This paid sick leave does not carry over from one year to the next, and this part of the legislation also sunsets on December 31, 2020. Employers may not discriminate against, discipline or discharge an employee who takes emergency paid sick leave, files a complaint or initiates a lawsuit about the emergency leave, or otherwise participates in a proceeding. Employers who violate the Act are subject to the same penalties as are provided for violations of the Fair Labor Standards Act (FLSA).

Small employers employing fewer than 50 employees may be able to claim an exemption to the requirements of the paid sick leave portion of the Act if it can show that compliance would jeopardize the viability of the business as a going concern.

Tax Credits for Employers

The Act also provides a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above. These tax credits are allowed against the employer portion of social security and Medicare taxes (collectively referred to as FICA). While this limits application of the tax credit, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

Specifically, employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by the employer for each calendar quarter in adherence with this Act. 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).

Similarly, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by the employers for each calendar quarter in accordance with this Act. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

Next Steps

The Secretary of Labor will have the authority to (i) issue regulations, (ii) exclude certain health care providers and emergency responders from the definition of an eligible employee and (iii) exempt small businesses with less than 50 employees where compliance would jeopardize the viability of the business.

The effective date of the new mandate will be no later than 15 days after the Act was signed by President Trump, which means an effective date no later than April 2, 2020. Also, a model notice that employers will need to post, should be available from the Secretary of Labor within the next week, and regulations for calculating the paid sick leave are supposed to be available within the next 15 days.

We will continue to monitor further COVID-19 developments. If you have questions or concerns, please contact your Lindner & Marsack attorney.