

Federal COVID-19 Legislation: The Families First Coronavirus Response Act

On March 18, 2020, the Families First Coronavirus Response Act was enacted to address the impact of the COVID-19 outbreak. The law takes effect on April 2, 2020 and will be in effect until December 31, 2020. The key provisions of the Act require employers to provide **paid sick leave** and **expanded emergency Family and Medical Leave Act (“FMLA”)** due to circumstances wherein employees are forced to miss work because of the COVID-19 outbreak.

Emergency Paid Sick Leave

Eligibility

Employers with fewer than 500 employees must provide full-time employees with 80 hours of paid sick leave at the employee’s regular rate or two-thirds of the employee’s regular rate if the employee is not taking the leave for himself or herself, but instead caring for another person (reasons 4, 5, or 6 below). This benefit is available regardless of the employee’s duration of employment prior to leave.

Health care providers or emergency responders are exempted at their election.

Allowable Reasons for Emergency Paid Sick Leave (“Emergency PSL”)

An eligible employee may take paid sick leave because the employee is:

- Subject to a federal, state, or local quarantine order related to COVID-19;

- Advised by a health care provider to self-quarantine due to COVID-19 concerns;
- Experiencing COVID-19 symptoms and seeking medical diagnosis;
- Caring for an individual subject to a federal, state, or local quarantine order or an individual advised by a health care provider to self-quarantine due to COVID-19 concerns (this is not limited to family members);
- Caring for the employee’s child if the child’s school or daycare is closed or unavailable due to public health emergency; or
- The employee is experiencing any other condition which is substantially similar to the conditions specified above.

Cap on Wages Paid

Wages paid for Emergency PSL are capped at \$511 per day up to \$5110 total per employee for their own eligibility and \$200 per day or up to \$2000 total to care for others or for reason #6 (substantially similar condition).

Covered employers are required, at the request of the employee, to pay a full-time employee for 80 hours of Emergency PSL leave instead of the initial 10 days of unpaid leave permitted by the Emergency Family and Medical Leave Expansion Act (summarized below).



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Calculating Amount Due

Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the 6 months prior to taking Emergency PSL. Employees who have worked for less than 6 months prior to Emergency PSL are entitled to the average number of hours the employee would normally have been scheduled to work.

No Carryover

Emergency PSL doesn't carry over to 2021.

Interaction with Other Paid Leave

At the employer's discretion, Emergency PSL may be in addition to any paid sick leave already provided by the employer.

Effective Dates

This program will become effective April 2, 2020 and will remain in effect until December 31, 2020.

Emergency FMLA Expansion

Which Employers are Covered?

The Act temporarily, but significantly, amends and expands the FMLA for a coronavirus-designated reason. Under FMLA, the current employee threshold for coverage is 50. The Act covers employers with fewer than 500 employees—from 1 to 500. Health care providers and emergency responders are exempted, and are thus not entitled to take Emergency FMLA for COVID-19.

Additionally, small businesses with fewer than 50 employees may be exempted from this new requirement if providing the leave would jeopardize the viability of the business.

Eligibility

Any employee who has worked for the employer for at least 30 days prior to the leave may be eligible to receive paid FMLA for a coronavirus-designated reason.

Reasons for Emergency FMLA

There is only one qualifying reason for Emergency FMLA: Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to 12 weeks of job-protected leave to allow an employee, who is unable to work or telecommute, to care for the employee's child (under 18 years of age) if the child's school or daycare is closed or the childcare provider is unavailable due to a public health emergency.

Details of the Paid Leave Benefit

The first 10 days of the Emergency FMLA may be unpaid. During this 10-day period, an employee may elect to substitute any accrued paid leave that the employer already provides (like vacation or sick leave) to cover some or all of the 10-day unpaid period.

After the 10-day waiting period, the employer must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled.

Pay for Non-Full Time Employees

Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the 6 months prior to taking the Emergency FMLA. Employees who have worked for less than 6 months prior to leave are entitled to the employee's

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reasonable expectation at hiring of the average number of hours the employee would normally have been scheduled to work.

Cap on Wages Paid

Emergency FMLA is capped at \$200 per day and \$10,000 in the aggregate per employee.

Job Protection

Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon the employee's return to work.

Employers with fewer than 25 employees are excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for a 1-year period (this is similar to a layoff call-back list).

Effective Dates

This program will become effective April 2, 2020 and will remain in effect until December 31, 2020.

Emergency Unemployment Insurance Stabilization and Access Act of 2020

This section of the Families First Coronavirus Response Act provides \$1 billion in 2020 for emergency grants to the states for matters related to unemployment insurance payment and processing.

Half of the \$1 billion is allocated to provide immediate funding to all states for administrative costs so long as they meet some basic requirements, such as, requiring employers to provide notification of the availability of unemployment compensation at the time of separation, ensuring applications for unemployment are accessible in at least two ways (in-person, by phone, or online), and application notification protocols.

The other half of the \$1 billion is reserved for emergency grants to states which experience an increase in unemployment claims of at least 10% in comparison to the same quarter in the prior calendar year. (New York will qualify.)

Qualifying states would be eligible to receive an additional grant to assist with costs related to such an unemployment spike if they meet additional requirements, including: (1) expressing of commitment to maintain and strengthen access to unemployment compensation; and (2) taking or planning to take steps to ease eligibility requirements and access (like waiving work search requirements and the waiting period). The Act will provide those states that meet these requirements with 100 percent federal funding to provide extended unemployment benefits, up to an additional 26 weeks after the initial 26 weeks (i.e. up to 52 weeks of benefits). Previously, states were required to pay 50% of extended unemployment benefits.

This provision is effective until December 31, 2020.

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Tax Credits for Emergency Paid Sick Leave and Emergency FMLA

This section provides a series of refundable tax credits for employers who were required to provide Emergency Paid Sick Leave. Employers are entitled to a refundable tax credit equal to 100% of the leave wages paid by employers for each calendar quarter. The amounts 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.

Employers are also entitled to a refundable tax credit equal to 100% of the Emergency FMLA wages paid for each calendar quarter. The Emergency FMLA is capped at \$200 per day for each individual up to \$10,000 total per calendar quarter.

Only employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave are eligible to receive these credits.

These tax credits are allowed against the employer portion of Social Security taxes. Employers will be reimbursed if their costs for these leaves exceed the taxes they would owe.

No Cost Sharing for COVID-19 Related Medical Costs

Employers must be sure their health plans are compliant with a provision of the Families First Coronavirus Response Act requiring insured, self-insured, and grandfathered health plans to provide coverage for COVID-19 diagnostic testing and related services to employees and their covered dependents, without cost sharing (like deductibles, copayments

and coinsurance) from March 18, 2020 through the end of the COVID-19 national emergency period.

Covered services and related cost waivers apply to diagnostic testing, health care provider services (in-person and telehealth), and facility costs (physician office, urgent care center, and emergency room) to the extent the costs are related to evaluating the need for, or furnishing, COVID-19 diagnosis and treatment.

Plans may not require prior authorization or similar medical management requirements as a precondition of COVID-19 testing or services.